6837

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 49.

THE KENNEDY MINING AND MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

(18,060.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 575.

THE KENNEDY MINING AND MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said supreme court of the State of California, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in that certain suit between The Argonaut Mining Company, a corporation, defendant in error, and Kennedy Mining and Milling Co. (a corp.), plaintiff in error, being the suit numbered in your records as Sacramento, number 733, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of its being repugnant to the Constitution or laws of the United States and the decision was in favor of such its validity, or wherein was drawn in question the construction of a clause of the Constitution or of a statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, statute, or *or* commission, a manifest error hath happened, to the great damage of the said Kennedy Mining and Milling Company, as by its complaint and answer appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid *said* in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

1½ Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 15th day of March, 1901, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of January, in the year of our Lord one thousand nine hundred and one.

[Seal of U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

Allowed this 14th day of January, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I hereby certify that a copy of the foregoing writ of error was on the 14th day of January, 1901, lodged in the clerk's office of the

said supreme court of the State of California for the said defendant in error.

GEO. W. ROOT,
Clerk Clerk *of the Supreme Court of the State of California.*
By W. E. BOODY, *Deputy.*

1¾ [Endorsed:] (Copy.) Sac., 733. Kennedy Mining and Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Writ of error. Lodged copy.

2 In the Supreme Court of the State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff and Respondent,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant and Appellant.
No. 733. (Sacramento.)

Transcript on Appeal.

John M. Wright, Byron Waters, attorneys for appellant.
Lindley & Eickhoff, Wm. J. McGee, and F. J. Solinsky, attorneys for respondent.

Filed this 28th day of August, A. D. 1899.
GEO. W. ROOT, *Clerk,*
J. J. DUNCAN,
Deputy Clerk.

3 In the Supreme Court of the State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant.
No. —.

Transcript on appeal from the superior court of Calaveras county, California; complaint filed in Amador county (numbered 1408) and cause afterwards transferred to Calaveras county.

Complaint.

In the Superior Court of Amador County, State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant.

4 Complaint.

Plaintiff complains of defendant and alleges:

I.

That at all times mentioned in this complaint the plaintiff, Argonaut Mining Company, was and now is a corporation organized, ex-

isting and doing business under and by virtue of the laws of the State of California.

II.

That at all times mentioned in this complaint the defendant, Kennedy Mining and Milling Company, was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

III.

That at all times mentioned in this complaint the plaintiff has been and now is the owner and in the possession and entitled to the sole and exclusive possession of all that certain mine and mining claim situate, lying and being in Jackson mining district, Amador county, State of California, designated by the surveyor general of the State of California as lot No. forty-eight (48), embracing a portion of the northeast quarter of section twenty (20) in town-
5 ship six (6) north of range eleven (11) east Mt. Diablo meridian, which said mine and mining claim was and is commonly known as and called the Pioneer quartz mine, and is more particularly described as follows, to wit:

Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty-one (21) in township six (6) north of range eleven (11) east Mount Diablo meridian bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south eighty-nine (89) degrees thirty-six (36) minutes west, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode, seven (7) chains and eighty (80) links to post marked 46; thence north nineteen (19) degrees fourteen (14) minutes west, twenty-three (23) chains and seven (7) links to post marked 46, at the northwest corner of the claim from which post marked 37 situate at the southwest corner of the Kennedy Company's claim upon the Kennedy mine bears south seventy-four (74) degrees fifty-one (51) minutes west at the distance of thirty-two (32) links; thence from said post marked 46 north seventy-four (74) degrees fifty-one (51) minutes east along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46 the same being situate at the northern
6 end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from which a post marked 37 situate at the southeast corner of the said Kennedy Company's claim bears north seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty-two links. Thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east four (4) chains and three (3) links to post marked 46 situate at the southwest corner of the mill site belonging to said Pioneer quartz mine and adjoining the same on the east, twenty-four (24) chains and fifty (50) links to post marked 46. Thence south fifty-seven (57) links to place of beginning.

And plaintiff avers that at all of said times it was and now is the owner, in the possession of and entitled to the exclusive possession of 1,589.94 linear feet of that certain quartz vein or lode known as the Pioneer quartz vein or lode, which has its apex within the premises hereinbefore described, with the exclusive right to said 1,589.94 feet of said lode throughout its entire depth although it may enter the land adjoining; and said plaintiff at all of said times was and now is the owner of all other veins, lodes and ledges throughout their entire length and depth, the top- or apices of which
7 lie within or inside of the exterior lines of the Pioneer quartz mine described as aforesaid, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside of the vertical side lines of said described Pioneer quartz mine.

IV.

That defendant has sunk an incline shaft upon land adjacent to plaintiff's mining claim and since August 11th, 1894, and prior to the commencement of this action, said defendant by means of said shaft and of levels, drifts, cross-cuts and stopes, has penetrated into and upon the said lands and premises belonging to this plaintiff as hereinbefore alleged and into and upon the lodes, ledges and veins having their apices within the surface lines of said Pioneer quartz mine, and by means of said underground works has willfully, wrongfully and unlawfully and without the license or consent of said plaintiff worked and mined said lodes, ledges and mining ground and has taken out and extracted therefrom and converted to its own use large quantities of gold-bearing quartz of great value.

And plaintiff alleges upon its information and belief that said defendant since August 11, 1894, and prior to the commencement of this action has extracted over three thousand tons of ore and
8 gold-bearing quartz from the veins, lodes and ledges aforesaid, and has taken out, carried away and converted the same to its own use. That said ore was of great value, to wit: of the value of 135 thousand dollars. That by reason of the aforesaid acts of defendant plaintiff has been damaged in the sum of one hundred and thirty-five thousand dollars.

V.

Plaintiff further alleges that defendant threatens to continue said wrongful acts and threatens to continue to so mine and work the veins, ledges and lodes so belonging to this plaintiff as hereinbefore set forth and to extract, remove and convert to its own use the gold-bearing ore and quartz therein and will do so unless restrained by the order of this court.

Wherefore plaintiff prays judgment against defendant.

First. For the sum of one hundred thirty-five thousand dollars damages and for its cost of suit herein.

Second. That the defendant and its agents, servants and employees be enjoined from trespassing upon said plaintiff's said property or

upon any portion thereof pending this action and from in any
9 manner extracting ore or gold-bearing quartz therefrom or entering in or upon the lodes or ledges of plaintiff.

Third. That by the final judgment of this court defendant be perpetually restrained and enjoined from trespassing upon the lands, lodes and ledges of plaintiff.

Fourth. That plaintiff have such other, further and general relief as may be just.

LINDLEY & EICKHOFF,
W. J. McGEE,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, } ss:
County of Amador, }

W. F. Detert, being first duly sworn, deposes and says:

I am the president of The Argonaut Mining Company, the plaintiff named in the foregoing complaint. I have read said complaint and know the contents thereof. The same is true of my own knowledge except as to the matters therein stated upon information or belief and as to such matters I believe it to be true.

W. F. DETERT.

Subscribed and sworn to before me this 5th day of August, 1897.

[NOTARIAL SEAL.] THOMAS CANLON,
Notary Public, Amador County, Cala.

10 (Endorsement:) No. 1408. In superior court, county of Amador. Argonaut Mining Company (a corporation), plaintiff, *vs.* Kennedy Mining and Milling Company, defendant. Complaint. Filed August 5, 1897. C. L. Culbert, clerk. Lindley & Eickhoff, attorneys for plaintiff, 530 California street, San Francisco, Cal., rooms 39, 40, 41, and 42. Filed May 6, 1898. A. L. Wyllie, clerk.

Answer.

In the Superior Court of the County of Amador, State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

Answer.

Now comes the above-named defendant and answers the complaint filed by the above-named plaintiff in the above-entitled action.

Defendant admits that at all the times mentioned in the
11 said complaint the plaintiff Argonaut Mining Company has been and that it now is the owner, and in possession and entitled to the sole and exclusive possession of all that certain mine

and mining claim situate, lying and being in Jackson mining district, Amador county, State of California, designated by the United States surveyor general for the State of California as lot No. forty-eight (48) embracing a portion of the northeast quarter of section twenty (20) in township six (6) north of range eleven (11) east Mt. Diablo meridian, which said mine and mining claim was and is called the Pioneer quartz mine.

And defendant admits and alleges that the particular description of said Pioneer quartz mine, to wit, said lot No. forty-eight, and of the exterior boundaries thereof and of the place of beginning thereof, set forth in said complaint, is true and correct, that is to say, that said Pioneer quartz mine, to wit, said lot number 48, is particularly and correctly described as follows, to wit: Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty-one (21) in township six (6) north of range eleven (11) east Mount Diablo meridian bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south
12 eighty-nine (89) degrees thirty-six (36) minutes west, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode seven (7) chains and eighty (80) links to post marked 46; thence north nineteen (19) degrees fourteen (14) minutes west, twenty-three (23) chains and seven (7) links to post marked 46, at the northwest corner of the claim from which post marked 37 situate at the southwest corner of the Kennedy Company's claim upon the Kennedy mine bears south seventy-four (74) degrees fifty-one (51) minutes west at the distance of thirty-two (32) links; thence from said post marked 46 north seventy-four (74) degrees fifty-one (51) minutes east, along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46, the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from which a post marked 37 situate at the southeast corner of the said Kennedy Company's claim bears north seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty-two (32) links; thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the mill site belonging to said Pioneer
13 quartz mine and adjoining the same on the east, twenty-four (24) chains and fifty (50) links to post marked 46, thence south fifty-seven (57) links to place of beginning.

And defendant admits and alleges that the southern end of the lode, to wit, the Pioneer lode, named and described in said complaint, is truly and correctly described in said complaint as being situate south eighty-nine (89) degrees thirty-six (36) minutes west three (3) chains and eighty (80) links from the aforesaid place of beginning of said Pioneer quartz mine, to wit, said lot number 48, and defendant alleges that the aforesaid southern end of said lode is and at all times named in said complaint was the place of begin-

ning *of beginning* of all and singular the aforesaid ownership, claim, possession and right of possession of said Argonaut Mining Company of, in and to the said lode.

And defendant alleges that the Pioneer quartz vein or lode which is alleged in said complaint to have its apex within said Pioneer quartz mine, to wit, said lot No. 48, dips easterly and extends downward to an unknown depth into the earth at an average angle of about forty-five (45) degrees easterly from the vertical, and in its said course downward passes from and extends out of said lot number 48 easterly through and beyond the vertical east side line thereof, into ground lying easterly from said lot number 48 and from said east side line thereof.

14 And defendant admits and alleges that, as set forth in said complaint, the southern end line of said Pioneer quartz mine, to wit, said lot number 48, is the beginning and initial boundary thereof, and that the end lines of said Pioneer quartz mine, to wit, said lot number 48, are not parallel, but, on the contrary, that the northern end line thereof in its course from its west end easterly diverges substantially and at a very large angle toward the north from a direction parallel to said southern end line and initial boundary thereof, such divergence being to the extent of fourteen (14) degrees and forty-five (45) minutes northerly from a direction parallel to said southern end line and initial boundary, the course of said southern end line and initial boundary from its west end easterly being north eighty-nine (89) degrees thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees fifty-one (51) minutes east, and defendant alleges that such divergence between said end lines is easterly and toward and in the direction of the aforesaid dip and downward extension of said Pioneer quartz vein or lode.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times whatever was or now is the owner, in the possession of and entitled to the exclusive posses-

15 sion of, or was or now is the owner of, or was or now is in the possession of, or was or now is entitled to the exclusive or any possession of 1,589.94 linear feet or any other number of linear or other feet or any portion of said Pioneer quartz vein or lode throughout its entire depth or to or at any depth or place outside of the surface lines of Pioneer quartz mine, to wit, said lot number 48, extended downward vertically, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589.94 linear feet or any other number of linear or other feet or any part of said Pioneer quartz vein or lode, which extends or lies outside the vertical side lines of the surface location of said Pioneer mine, to wit, said lot number 48, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589.94 linear feet or any other number of linear or other feet or any part of said Pioneer vein or lode, which enters

or lies within the land or any land adjoining the Pioneer mine, to wit, said lot number 48.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times whatever, was or now is the owner of all other veins, lodes and ledges, or of any other
16 vein or veins, lode or lodes, ledge or ledges, the tops or apices of which lie within or inside of the exterior lines of said Pioneer quartz mine extended downward vertically, throughout their entire length and depth or throughout or to or at any length or depth or place whatever outside of the vertical side lines of said Pioneer quartz mine, and defendant denies that said plaintiff at any time or times whatever was or now is the owner or in any manner entitled to said or any vein or veins, or lode or lodes, or ledge or ledges, or any part of them, or any of them, which in their downward course so far depart from a perpendicular as to extend outside of the vertical side lines of said Pioneer quartz mine, and defendant denies that said plaintiff ever was or now is the owner of any part, parcel or portion of any lode, vein or ledge named in said complaint, extending or lying outside the vertical boundaries of said Pioneer quartz mine, to wit, said lot number 48, whether the top or apex of any such lode or vein or ledge lies within or without the vertical boundaries of said lot number 48.

And defendant denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, said defendant by means of the shaft named in said complaint and of levels, drifts, cross-cuts and stopes, or by means of any of
17 them, or by means of any shafts or shaft or levels or level or drifts or drift or cross-cuts or cross-cut or stopes or stope or by any other means or at all, has penetrated into or upon said or any lands or premises then or ever belonging to said plaintiff or upon the or any ledge or ledges, or lode or lodes or vein or veins having their apices within said Pioneer quartz mine, and defendant denies that at all or any of the times aforesaid or at any time or times whatever, defendant by means of said underground works or by means of any underground works or by any other means or at all, willfully, wrongfully and unlawfully and without the license or consent of said plaintiff or willfully or wrongfully or unlawfully or with or without the license or consent of said plaintiff, worked and mined or worked or mined said lodes, ledges, and mining ground or any of them or any lodes or lode or ledges or ledge or mining ground then or ever belonging to said plaintiff, and took out and extracted and converted to its own use or took out or extracted or converted to its own use or any use, therefrom or from any ground or premises then or ever belonging to said plaintiff, large or any quantities or quantity of gold-bearing quartz of great or any value.

And defendant denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, defendant extracted three thousand tons or any other number
18 of tons or any quantity of ore and gold-bearing quartz or three thousand or any other number of tons or any quantity of ore or gold-bearing quartz from the veins, lodes and ledges afore-

said or any of them or from any veins or vein, lodes or lode, ledges or ledge, then or ever belonging to said plaintiff, and took out, carried away and converted the same or any thereof to its own use or took out or carried away or converted the same or any thereof to its own or any use, and defendant denies that said ore was of the value of one hundred and thirty-five thousand dollars or of the value of any other sum or of any value at all, and defendant denies that said plaintiff was damaged by the acts of said defendant set forth in said complaint or by any acts or act of said defendant in the sum of one hundred and thirty-five thousand dollars or in any other sum or in any manner or at all.

And defendant denies that it did ever at any time by means of any shafts or shaft or of any levels or level, drifts or drift, cross-cuts or cross-cut, stopes or stope or by any means whatever or at all, penetrate into or upon any lands or land or premises or lodes or lode or ledges or ledge or veins or vein belonging in any manner to said plaintiff, and denies that by means of underground works or by any means or at all, said defendant willfully or wrongfully or unlawfully or without the license and consent of said plaintiff or at all, worked or mined any lodes or lode or ledges or ledge or mining ground belonging in any manner to said plaintiff, and denies that said defendant ever at any time took out or extracted therefrom or converted to its own or any use large or any quantities or quantity or ore, gold-bearing rock or quartz of great or any value, and denies that said defendant extracted therefrom three thousand tons or any quantity of ore or gold-bearing quartz or any ore or gold-bearing quartz whatever, and denies that said defendant ever took away or converted the same or any thereof to its own or any use or at all, and denies that said ore was of the value of one hundred and thirty-five thousand dollars or of any other sum or of any value and denies that said plaintiff was ever damaged by any acts or act of this defendant in the sum of one hundred and thirty-five thousand dollars or in any other sum or at all.

And defendant denies that it ever entered upon any premises of said plaintiff without its knowledge, license and consent first had and obtained.

And defendant denies that it ever entered upon or penetrated underground any lode or premises belonging to said plaintiff either with or without its consent.

And defendant denies that it ever worked or mined any lode or premises belonging to said plaintiff.

And defendant denies that it ever extracted or took out from any lode or premises belonging to said plaintiff, any ore or anything whatever.

And defendant denies that it ever took away or converted to its own or any use any gold-bearing quartz or any other thing belonging to said plaintiff.

And defendant denies that said plaintiff was ever damaged by any act or acts of defendant in any sum or value whatever.

And defendant denies that defendant threatens to continue the wrongful acts alleged in plaintiff's said complaint, and denies that

defendant threatens to continue or to do or perform any wrongful acts whatever, and denies that defendant threatens to mine and work the veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to mine and work or to mine or work any veins or vein or ledges or ledge or lodes or lode belonging to plaintiff, and denies that defendant threatens to extract, remove and convert to its own use the gold-bearing ore and quartz in said veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to extract or remove or convert to its own or any use the gold-bearing ore or quartz in said or any veins or vein or ledges or ledge or lodes or lode belonging to plaintiff.

21 Wherefore, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed, with judgment for its reasonable costs and charges in this behalf sustained.

JOHN M. WRIGHT,
Attorney for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

John Barton, being first duly sworn, deposes and says: That he is an officer, to wit, the president, of Kennedy Mining and Milling Company, the defendant named in the foregoing answer; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such matters that he believes it to be true.

JOHN BARTON.

Subscribed and sworn to before me this the 12th day of Feb'y, 1898.

[NOTARIAL SEAL.] JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsement:) No. 1408, original. State of California, county of Amador. In the superior court. Argonaut Mining Com-
22 pany (a corporation), plaintiff, *vs.* Kennedy Mining and Milling Company (a corporation), defendant. Answer. Service of the within by delivery of a copy thereof admitted this the 12th day of February, 1898. Lindley & Eickhoff, W. J. McGee, attorneys for plaintiff. John M. Wright, rooms 47 and 10, eighth floor, Mills building, San Francisco, attorney for defendant. Filed Feb. 14, 1898. C. L. Culbert, clerk, by B. R. Breese, deputy clerk. Filed May 6, 1898. A. L. Wyllie, clerk.

23 *Stipulation for Entry of Order Changing Place of Trial.*

In the Superior Court of Amador County, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

Stipulation for Entry of Order Changing Place of Trial.

It appearing that the judge of the superior court of Amador county is disqualified from acting in this cause, it is stipulated that an order may be made herein transferring said cause for trial to the superior court of Calaveras county, State of California.

24 Dated April 7, 1898.

LINDLEY & EICKHOFF,
W. J. McGEE,
Attorneys for Plaintiff.
JOHN M. WRIGHT,
Attorney for Defendant.

(Endorsed:) No. 1408. In superior court, county of Amador, State of California. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling —, defendant. Stipulation for entry of order changing place of trial. Filed April 13, 1898. C. L. Culbert, clerk. Lindley & Eickhoff, attorneys for —, 530 California street, San Francisco, Cal. Rooms 39, 40, 41, and 42. Filed May 6, 1898. A. L. Wyllie, clerk, by —— ——, deputy clerk.

25 *Order Transferring Cause to Calaveras County for Trial.*

In the Superior Court of Amador County, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

Order Transferring Cause.

Upon reading and filing the stipulation of the parties hereto, and it appearing that the judge of this court is disqualified from acting in this cause, it is ordered that this cause be transferred to the superior court of Calaveras county, State of California, for trial.

26 Dated April 13th, 1898.

R. C. RUST, *Judge.*

O. K.

LINDLEY & EICKHOFF,
W. J. McGEE,
Attorneys for Plaintiff.

O. K.

JOHN M. WRIGHT,
Attorney for Defendant.

(Endorsed:) No. 1408. In superior court, county of Amador, State of California. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling Company, defendant. Order transferring cause. Book 9, page 59. Filed April 13, 1898. C. L. Culbert, clerk. Lindley & Eickhoff, attorneys for plaintiff, 530 California street, San Francisco, Cal. Rooms 39, 40, 41 and 42. Filed May 6, 1898. A. L. Wyllie, clerk, by —— ——, deputy clerk.

27 *Decision.*

In the Superior Court of Calaveras County, State of California.

(Transferred from Amador County.)

ARGONAUT MINING COMPANY (a Corporation), Plaintiff, *vs.* KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant.	No. 1408. Formerly No. 1408 in the Superior Court of Amador County.

This cause came on regularly for trial on September 14th, 1898. Messrs. Lindley & Eickhoff, W. J. McGee and F. J. Solinsky appeared for plaintiff and Messrs. John M. Wright, Byron Waters and John J. Snyder appeared for defendant.

Thereupon said cause was submitted to the court for its decision upon an agreed statement of facts in writing, pursuant to a stipulation in writing signed in that behalf by the attorneys for the respective parties, which said agreed statement of facts and stipulation are now on file in said cause, and are as follows, to wit:

28 "*Agreed Statement of Facts and Stipulation Submitting Cause.*

"In the Superior Court of the County of Calaveras, State of California.

"ARGONAUT MINING COMPANY, Plaintiff, *vs.* "KENNEDY MINING AND MILLING COMPANY, Defendant.	No. —. Formerly No. 1408 in the Superior Court of Amador County.

"Agreed statement of facts and stipulation submitting cause.

"It is stipulated and agreed that for all the purposes of this action the following facts are true and for the purposes of the trial hereof they shall be deemed and taken as if proved by sufficient evidence, but the admission of such facts respectively as evidence in this cause shall be deemed and taken as duly objected to by the respective parties for want of relevancy and materiality to and competency to prove the issues presented by the pleadings, as fully for all purposes as though such objections were separately made and noted on the record in the customary legal manner.

"And it is further stipulated and agreed that the admission of each of such facts as evidence and such objections thereto shall be

ruled upon by the court at the time of the court's decision of the cause after final argument and submission.

29 "Each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the court the same as though made in open court or as though specifically set forth in this stipulation.

"And it is further stipulated and agreed that each of such rulings by the court upon the admission of such facts as evidence and upon such objections thereto, shall be deemed and taken as duly excepted to by the party against which such ruling shall be made, as fully for all purposes as though such exceptions were separately taken and noted on the record in the customary legal manner.

I.

"That the plaintiff in this action is and ever since June 14th, 1893, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

"That the defendant Kennedy Mining and Milling Company is and ever since December 22, 1886, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

30 III.

"That on and for more than twenty-five years prior to July 3rd, 1893, the Pioneer Gold and Silver Mining Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

IV.

"That at the time of its application for patent for the premises known as 'Kennedy mine' hereinafter described the Kennedy Mining Company was and for many years thenceforward continued to be a corporation organized and existing under the laws of the State of California.

V.

"On October 13, 1870, said Kennedy Mining Company filed its application for patent in the United States land office at Sacramento, California, wherein it applied for a patent to the property generally known as the 'Kennedy mine' now designated as lot number 44, forming a portion of sections 17 and 20 in township 6 north, of range eleven east, Mt. Diablo meridian.

"A diagram of the premises for which patent was so applied for was posted in the U. S. land office at Sacramento on October 15, 1870.

VI.

"On January 13th, 1871, the Pioneer Gold and Silver Mining Company, the immediate predecessor in title of this plaintiff, filed its application for patent in the United States land office at
31 Sacramento, California, wherein and whereby it applied for the issuance to it of a patent for the premises commonly known as and called the Pioneer quartz mine, now known as lot No. 48, embracing a portion of N. E. quarter of section 20, T. 6 N., R. 11 E., Mt. Diablo meridian, and a diagram of the ground so claimed and for which patent was sought was posted in the office of the register of said land office and upon said claim.

VII.

"That there was a surface conflict as to area claimed by said respective applicants for patent, as shown by the proceedings in said land office, said conflict occurring on the northern end of said Pioneer quartz mine as applied for, and the southern end of said Kennedy mine, as applied for.

"That thereupon, and on January 13th, 1871, the register and receiver of said land office made and entered the following order:

"'U. S. LAND OFFICE,
"'SACRAMENTO, CAL., *Jan. 13th*, 1871.

"'In the Matter of the Application for Patent and Adverse Claim of THE PIONEER GOLD AND SILVER MINING COMPANY, a Corporation,

vs.

"'THE KENNEDY MINING COMPANY, a Corporation, Applicant under Acts of Congress of July 26th, 1866, and July 9th, 1870.

"'Now, on this day, upon a careful examination of the foregoing testimony and the application and records of said application and adverse claim herein filed, we find that said adverse claim
32 is such a one as is contemplated by the 6th section of the act herein provided and the regulations of the General Land Office; and that said adverse claimant is entitled to a search and be heard relative thereto in the local courts.

"'It is therefore hereby ordered that the proceedings in the case of Kennedy Mining Company, applicant for a patent be and the same are hereby suspended so far as the same affects the following-described piece or parcel of land, commencing at the northern boundary of said Pioneer Gold and Silver Mining Company's claim and running thence southerly on said vein or lode, and surface ground of said Pioneer Company 153.78 feet, which portion thereof is claimed by the Kennedy Mining Company, a corporation; said land being in the N. E. ¼ of section 20, township 6 north, range 11 east, Mount Diablo base and meridian, until an adjustment can be

had of said adverse claim in the local courts having jurisdiction thereof as required by said acts and regulations herein provided.

"'JOHN G. McCALLUM, *Register.*
"'HART FELLOWS, *Receiver.*'"

VIII.

"That thereafter, and on February 20th, 1871, the said respective applicants for patent, to wit, the Pioneer Gold and Silver Mining Company, and the Kennedy Mining Company, made and entered into an agreement in writing which was filed in the office of said register and receiver at Sacramento, and forms a part of the record of each of said applications for patent.

"Said agreement is in words and figures following, to wit:

33 "'In the Matter of the Applications Respectively of THE PIONEER GOLD AND SILVER MINING COMPANY and THE KENNEDY MINING COMPANY for Patents to Quartz Mining Claims.

"'Whereas, the above-named corporations have respectively filed applications in the United States land office at Sacramento, for patents, to quartz mining claims in Amador county, California, from which it appears that there is a conflict of claim to a portion thereof.

"'And, whereas, the said corporations have mutually adjusted, settled and compromised such conflict of claims.

"'Now, therefore, in consideration thereof these presents witnesseth: That the Pioneer Gold and Silver Mining Company withdraws from its application as aforesaid any claim to the northern portion of the quartz lode or lead and surface ground therein described and embracing forty feet and six inches, to wit: Beginning at the live-oak tree, the point of commencement mentioned in said application, and extending thence south, the aforesaid forty feet and six inches. And the Kennedy Company abandons all claim to any portion of the said quartz lode or lead and surface ground, south of the point where such extent of forty feet and six inches shall terminate.

"'And the dividing line between the claims of the respective companies shall be one drawn at right angles with the general course of the lode or lead, and surface grounnd thereto appurtenant, and at the point hereinbefore designated, to wit: where such extent of forty feet and six inches shall terminate.

34 "'Witness, the private seal of the Pioneer Gold and Silver Mining Company (no corporate seal having yet been provided for that company) and the corporate seal of the Kennedy Mining

Company with the signatures of the officers of each company respectively hereunto set this 20th day of February, A. D. 1871.

"'THE PIONEER GOLD AND SILVER MINING COMPANY. [SEAL].
"'LOUIS MENTZEL, *President*,
"'G. WELLER, *Secretary*,
"'F. HOFFMAN AND
"'GEORGE STOESSEL,
"' *Trustees Pioneer Gold and Silver Mining Company*,
"'By LOUIS MENTZEL.
"'SAMUEL W. BRIGHT,
"' *President Kennedy Mining Company.*
"'P. REICHLING,
"'J. MEEHAN, *Trustees.*
[L. S.] "'C. H. TURNER,
"' *Secretary Kennedy Mining Company.*'

IX.

"That on the 15th day of March, 1871, the surveyor general of the United States for the State of California issued his instructions to William L. McKim, United States deputy mineral surveyor, to make survey for patent of said Kennedy quartz mine.

X.

"That in pursuance of said instructions said William McKim during the months of April and May, 1871, made and completed such survey and thereupon made a return of such survey to the United States surveyor general's office, and on the 19th day
35 of October, 1871, said surveyor general approved said survey as so returned and thereafter and on the 11th day of November, 1871, said Kennedy Mining Company entered and paid for said mining claim so surveyed by said McKim and the receiver of the said United States land office thereupon issued his duplicate receipt evidencing such entry and payment.

XI.

"That, thereafter, to wit, on the 29th day of July, 1872, the Government of the United States issued to said Kennedy Mining Company its certain letters patent of which the following is a copy:

"'General Land Office No., 393; mineral certificate No. 38.

"'The United States of America to all to whom these presents shall come, Greeting:

"'Whereas, in pursuance of the act of Congress approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof approved July 9th, 1870; and the act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the

development of the mining resources of the United States," there have been deposited in the General Land Office of the United States, the plat and field-notes of survey of the claims of the Kennedy Mining Company, upon the Kennedy quartz mine, bearing gold, accompa-
36 nied by the certificate of the register of the land office of Sacramento in the State of California, whereby it appears that in pursuance of said acts of Congress the Kennedy Mining Company did, on the eleventh day of November, A. D. 1871, enter and pay for said mining claim or premises, being mineral entry No. 38, in the series of said office, designated by the surveyor general as lot number forty-four (44) forming a portion of sections seventeen (17) twenty (20) in township six (6) north of range eleven (11) east, Mount Diablo meredian in the Jackson mining district in the county of Amador, and State of California in the district of lands subject to sale at Sacramento embracing twenty-seven and eighty-five-hundredths (27.85) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation as hereinafter stated, east to wit:

"'Beginning for the description of that portion of the lode hereby conveyed at a post marked 37, from which the northeast corner of section twenty (20) in township six (6) north of range eleven (11) east, Mount Diablo meridian, bears north seventy-four (74) degrees twenty-six (26) minutes east, with magnetic variation at seventeen (17) degrees east at the distance of thirty-one (31) chains and seventy-three (73) links; thence from said post south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eight (8) chains and sixty-two (62) links to post marked 37 situate at southern boundary of the Kennedy quartz mine and from said post first hereinbefore described north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east four (4) chains and thirteen (13)
37 links to oak post marked 37, from which the northeast corner of said section twenty (20) bears north eighty-one (81) degrees thirty-six (36) minutes east at the distance of thirty (30) chains thirty-one (31) links; thence from said oak post north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, two (2) chains to Ione and Jackson road three (3) chains and fifty-five (55) links to ravine, seventeen (17) chains and seventy-seven (77) links to post marked 37 situate on the north boundary of claim.

"'Beginning for the description of the surface ground hereby conveyed at post marked 37 situate at the northwest corner of the claim. Thence north seventy-three (73) degrees thirty-nine (39) minutes east with magnetic variation at sixteen (16) degrees thirty-seven (37) minutes east seven (7) chains and fifty-eight (58) links to post marked 37; thence south fifteen (15) degrees eighteen (18) minutes east with magnetic variation at seventeen (17) degrees east, eighteen (18) chains and fifty-five (55) links to post marked 37; thence south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eleven (11) chains and ninety-one links

to post marked 37; thence south seventy-four (74) degrees fifty-one (51) minutes west with magnetic variation at seventeen (17) degrees east, eight (8) chains and twenty-four (24) links to post marked 37; thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, thirteen (13) chains and fifty-nine links to post marked 37; thence north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, sixteen (16) chains and ninety-nine (99) links to the place of beginning.

38 "'Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at post marked 37, situate at the southeast corner of the land survey hereinbefore described; thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, eight (8) chains to lone and Jackson road eleven (11) chains and ninety-one (91) links to post marked 37; thence north fifteen (15) degrees eighteen (18) minutes west seventy-eight (78) links to a post; thence north seventy-four (74) degrees forty-two (42) minutes east two (2) chains to a post; thence south thirteen (13) degrees forty-two (42) minutes east eleven (11) chains and seventy-three (73) links to a post; thence south seventy-four (74) degrees fifty-one (51) minutes west six *six* (6) chains and forty-one (41) links to the place of beginning.

"'The aggregate area hereby conveyed being twenty-seven (27) acres and eighty-five-hundredths ($\frac{85}{100}$) of an acre of land, more or less, as represented by yellow shading in the following plat.

(Here follows plat.)

"'Now know ye: that the United States of America, in consideration of the premises, and in conformity with said acts of Congress, have given and granted, and by these presents do give and grant unto the said Kennedy Mining Company and to their successors and assigns, the said mining premises hereinbefore described as lot number forty-four (44) forming a portion of sections seventeen and twenty in township six (6) north of range eleven east Mt. Diablo mer. with

39 the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of two thousand and fourteen and thirty-hundredths linear feet of the said Kennedy quartz mine, vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining and of all veins, lodes, ledges or deposits, throughout their depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey:

"'Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect

such exterior parts of said veins, lodes, ledges or deposits; and provided further that nothing in this conveyance shall authorize the grantees herein, their successors or assigns, to enter upon the surface of a mining claim owned or possessed by another:

"'To have and to hold said mining premises together with the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said Kennedy Mining Company and to their successors and assigns forever, subject, nevertheless, to the following conditions and stipulations:

"'First. That the grant hereby made is restricted to the land hereinbefore described as lot number forty-four with two thou-
40 sand and fourteen and $\frac{3}{10}$ linear feet of the Kennedy quartz mine, vein, lode, ledge or deposit, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid the tops or apexes of which lie inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of *of* May, eighteen hundred and seventy-two.

"'Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode ledge or deposit.

"'Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and right to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

"'Fourth. That in the absence of necessary legislation by Congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

"'In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

41 "'Given under my hand at the city of Washington, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States, the ninety-seventh.

"'By the President:

"'U. S. GRANT.

"'By Z. B. STURGUS,

"'*Ass't Secretary.*

"'[Seal of U. S. Gen. Land Office.]

"'C. B. BOYNTON,

"'*Recorder of the General Land Office.*

"'Recorded vol. 4, pages 293 to 300.

"'Examined.'

XII.

"That thereafter, to wit, on the 28th day of December, 1886, said Kennedy Mining Company conveyed to said Kennedy Mining and Milling Company all the property and rights conveyed to it the said Kennedy Mining Company, by means of said letters patent and the only title claimed or asserted by said Kennedy Mining Company in and to said Kennedy mine is such as is established by the said United States patent.

XIII.

"That on the 16th day of June, 1871, the United States surveyor general for the State of California, issued his instructions to said William L. McKim to make survey for patent for said Pioneer quartz mine.

XIV.

"That in pursuance of said instructions, said William L. McKim on September 1st, 1871, completed his survey for patent of said Pioneer quartz mine, and thereupon returned said survey to
42 the United States surveyor general's office, and on the 21st day of December, 1871, said surveyor general approved said survey.

"That said return of survey of said Pioneer quartz mine as so approved by said surveyor general was and is in the words and figures following, to wit:

"'*Field-notes*

of the survey of that certain gold-bearing quartz vein or lode of gold-bearing quartz rock known as the

"'Pioneer mine

in the Jackson mining district, and numbered 48, section 20, township 6 north, range 11 east Mount Diablo meridian, in the county of Amador, State of California, by William L. McKim, United States deputy mineral surveyor, in pursuance with special instructions from J. R. Hardenbergh, U. S. surveyor general for California, bearing date the 10th day of June A. D. 1871.

"'Survey commenced, August 31, 1871.

"'Survey completed, September 1, 1871.

"'Field-notes

of the line along the vein or lode are as follows, viz:

"'Beginning at a post marked 46 standing at the southern boundary of said line, from which the ¼ section post between sections 20 and 21, township 6 north, range 11 east of Mount Diablo meridian bears

"'Chains.	N. 89° 36′ E.	Variation 17° E.
"' 23.91		distant; a white oak, 30 in. dia. bears N. 86° 44′ W. 0.40 chs. dist. A black live-oak stump (and second growth) 30 in. diam. bears S. 78° 44′ E. 1.34 chs. dist.
43		
"'		Thence
"'	N. 19° 14′ W.	along said line of vein
"'Chains.		Variation 17° E.
"' 2.14		An open cut on the west of the line.
"' 2.68		An open cut on the east of the line.
"' 9.00		An open cut on the east of the line.
"' 19.34		A shaft 60 feet deep.
"' 22.99		A shaft 20 feet deep.
"' 23.09		South end of open cut on the vein.
"' 24.09		North end of open cut and post marked 37 and 46, and common to the southern boundary of the center line of the Kennedy quartz mine, and northern boundary of the center line of the Pioneer quartz mine, from which a pine, 8 in. dia. bears N. 2° 20′ E. 0.47 chs. dist., a pine 6 in. diam. bears S. 63° 54′ E. 0.91 chs. dist.

"'Field-notes

of the exterior boundaries of the land claimed with the Pioneer mine are as follows, to wit:

"'Beginning at a post marked 46, from which the ¼ section post on the line between sections 20 and 21 bears

"'Chains.	N. 89° 36′ E.	Variation 17° E.
44		
"' 20.11		distant; thence
"'	S. 89° 36′ W.	Variation 17° E.
"' 3.80		A post marked 46 and southern boundary of the center line of said vein or lode.
"' 7.80		Set a post marked 46 and S. W. corner of the land claimed with said
"'	N. 19° 14′ W.	mine. Thence along the western boundary of said land.

"			Variation 17° E.
"	23.67		Set a post marked 46 and N. W. corner of the land claimed with the Pioneer quartz mine, from which a post marked 37 at the S. W. corner of the land claimed with the Ken-
"		S. 74° 51′ W.	nedy mine bears, 32 links distant.
"		N. 74° 51′ E.	Thence, along the southern boundary of the land claimed with the Ken-
"	3.80		nedy mine, a post marked 37 and 46 and common to the southern boundary of the center line of the vein or lode of the Kennedy mine and northern boundary of the center line of the vein or lode of the pioneer mine.
"	7.60		Set a post marked 46 at the N. E. corner of the land claimed with the
45			Pioneer mine, from which a post marked 37 at the S. E. corner of the
" Chains.			land claimed with the Kennedy
"		N. 74° 51′ E.	mine, bears 32 links distant. Thence,
"		S. 19° 14′ E.	along the eastern line of said claim,
			Variation 17° E.
"	3.50		Entrance of tunnel on the east
"	4.03		end of line. Set a post marked 46 for S. W. corner of land claimed as a mill site.
"	4.25		Entrance of tunnel on the west of line.
"	24.50		Set a post marked 46.
"			Thence
"		South	Variation 17° E.
"	0.57		to place of beginning, containing 18.23 acres.

" Field-notes

of the exterior boundaries of the land claimed with the Pioneer mine as a mill site.

" Beginning at a post marked 46 and N. E. corner of the land claimed with the Pioneer mine. Thence,

" Chains.	N. 74° 51′ E.	along the southern boundary of the lands of the Kennedy mine and mill site.
"		Variation 17° E.
" 0.32		A post marked 37 and S. E. corner of the land claimed with the Ken-

46 nedy mine and S. W. corner of land claimed as a mill site.

"'Chains.
"' 6.73 A post marked K. M. S. and S. E. corner of land claimed with the Kennedy mine as a mill site.
"' Thence
"' S. 37° 38′ E. Variation 17° E.
"' 7.05 Set a post for S. E. corner. Thence
"' S. 89° 36′ W. Variation 17° E.
"' 9.55 A post marked 46 at the intersection of the east line of the land claimed with the Pioneer mine. Thence
"' N. 19° 14′ W. Along the eastern boundary of the land claimed with said mine.
"' Variation 17° E.
"' 4.03 to the place of beginning, containing
" 3.99 acres.

"'*Report.*

"'U. S. DEPUTY SURVEYOR'S OFFICE,
"'JACKSON, *Nov'r* 14, 1871.

"'Hon. J. R. Hardenbergh, U. S. surveyor general for California.

"'SIR: In compliance with instructions from your office, bearing date June 16th, 1871, I herewith submit the following report and return of the improvements and character of the same; in and upon that certain gold-bearing quartz vein or lode of gold-bearing quartz rock, known as the Pioneer mine, situate in Jackson mining
47 district, section 20, township 6 north, range 11 east, Mount Diablo meridian, county of Amador, State of California:

"'Total value of labor and improvements.

"'From the affidavits of S. W. Bright, C. Weller and Frank Hoffman, herewith exhibited and marked respectively, Exhibits "C," "D" and "E," and made a part of this return and report.

"'The least amount set forth in said affidavits as the value of labor and improvements in and upon said Pioneer mine, is seven thousand dollars.

"'Character of improvements.

"'1st. One timbered tunnel 684 feet in length.
"'One tunnel 100 feet in length.
"'One tunnel 60 feet in length.
"'2nd. One shaft 4 x 6 feet, 75 feet in depth.
"'One shaft 4 x 6 feet, 75 feet in depth.
"'3d. Several open cuts and prospect holes.

"'There is no mill attached to the mine.

"'The general dip of the vein is about 45° and dips to the east.

"'The elevation of the mine above the sea is about 1,300 feet, and it is situated on the main road from Jackson to Sutter.

"'Very respectfully, your ob't serv't,

"'WILLIAM L. McKIM,

"'*U. S. Mineral Surveyor for Amador Co., Cala.*

List of Names.

"'A list of the names of the individuals employed to assist in running, measuring, or marking the lines and corners described in the foregoing field-notes of the final survey of that certain
48 mining claim known as the Pioneer mine No. 46, a gold-bearing quartz vein or lode of gold-bearing quartz rock in the Jackson mining district, section 20, T. 6 N., R. 11 E. of Mt. Diablo meridian, Amador Co., Cala., showing the respective capacities in which they acted.

"'William L. McKim, U. S. dept. surveyor, compassman.

"'D. D. Reaves, chainman.

"'James F. Purslowe, chainman.

"'—— ——, axeman.

Final Oaths of Assistants.

"'We hereby certify that we assisted William L. McKim, U. S. mineral deputy surveyor, in surveying that certain gold-bearing quartz vein or lode of gold-bearing quartz rock, known as the Pioneer mine in Jackson mining district, No. 46 township 6 north range 11 east of Mt. Diablo meridian, and that said survey has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the surveyor general.

"'D. D. REAVES.

"'JAMES F. PURSLOWE.

"'Subscribed and sworn to before me this 1st day of September, 1871.

"'WILLIAM L. McKIM,

"'*U. S. Deputy Surveyor.*

Final Oath of Deputy Surveyor.

"'I, William L. McKim, U. S. mineral deputy surveyor, do solemnly swear that in pursuance with instructions from J. R.
49 Hardenbergh, United States surveyor general for California, bearing date the 16th day of June, A. D. 1871, I have well, faithfully and truly, in my own proper person, and in strict conformity with the instructions furnished by the surveyor general, the surveying manual, and the laws of the United States, surveyed all those parts or portions of that certain mining claim, known as the

Pioneer mine, a gold-bearing quartz vein or lode of gold-bearing quartz rock, situate in the Jackson mining district, section 20, township 6 north, range 11 east of Mount Diablo meridian, county of Amador, State of California, as are represented in the foregoing field-notes as having been surveyed under my direction; and I do further solemnly swear that all the corners of said surveys have been established and perpetuated in strict accordance with the surveying manual and printed instructions, and that the foregoing are the true and original field-notes of such survey.

"'WILLIAM L. McKIM,
"'*U. S. Deputy Surveyor.*

"'Subscribed and sworn to before me, this 4th day of December, 1871.

"'R. M. BRIGGS,
"'*United States Commissioner for Amador County, California.*'

XV.

"That thereafter and on the 23rd day of February, 1872, the said Pioneer Gold and Silver Mining Company entered and paid for said mining claim as so surveyed by said William L. McKim, and the receiver of said United States land office thereupon issued his duplicate receipt evidencing such entry and payment.

50 XVI.

"That thereafter, to wit, on the 12th day of August, 1872, the Government of the United States issued to said Pioneer Gold and Silver Mining Company its certain letters patent of which the following is a copy:

"'General Land Office No., 406; mineral certificate No. 63.

"'The United States of America to all to whom these presents shall come, Greeting:

"'Whereas, in pursuance of the act of Congress approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof, approved July ninth, eighteen hundred and seventy; and the act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States" there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of the Pioneer Gold and Silver Mining Company upon the Pioneer quartz lode bearing gold, accompanied by the certificate of the register of the land office at Sacramento, in the State of California, whereby it appears that in pursuance of said acts of Congress, the Pioneer Gold and Silver Mining Company did, on the 23rd day of February, A. D. 1872, enter and pay for said mining claim or premises,

being mineral entry No. 63, in the series of said office,
51 designated by the surveyor general as lot number forty-eight (48) embracing a portion of the northeast quarter of section twenty (20) in township six north of range eleven east Mt. Diablo meridian in the Jackson mining district, in the county of Amador and State of California, in the district of lands subject to sale at Sacramento, embracing twenty-two and twenty-two-hundredths (22.22) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation at seventeen (17) degrees east, to wit:

"'Beginning for the description of said land claimed with said lode at a post marked 46, from which the quarter-section corner between sections twenty (20) and twenty-one (21) in township six (6) north of range eleven (11) east, Mount Diablo meridian, bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south eighty-nine (89) degrees thirty-six (36) minutes west three (3) chains and eighty (80) links to post marked 46 at southern end of said lode, seven (7) chains and eighty (80) links to post marked 46; thence north nineteen (19) degrees fourteen (14) minutes west twenty-three (23) chains and seven (7) links to post marked 46 at the northwest corner of the claim, from which post marked 37 situate at the southwest corner of the Kennedy Company's claim, upon the Kennedy mine bears south seventy-four (74) — fifty-one (51) minutes west at the distance of thirty-two (32) links; thence from said post marked 46 north seventy-four (74) degrees fifty-one (51) minutes east along the southern boundary of
52 the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46—the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim, seven (7) chains and sixty (60) links to post marked 46, from which a post marked 37 situate at the southeast corner of the said Kennedy Company's claim bears north seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty-two (32) links; thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east, four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the mill site hereby conveyed, twenty-four (24) chains and fifty (50) links to post marked 46; thence south fifty-seven (57) links to the place of beginning, containing eighteen (18) acres and twenty-three-hundredths $(\frac{23}{100})$ of an acre of land, more or less.

"'Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at a post marked 46, situate at the northeast corner of the land hereinbefore described; thence north seventy-four (74) degrees fifty-one (51) minutes east along the southern boundary of the Kennedy Company's mill site thirty-two (32) links to a post marked 37 situate at the southwest corner of said Kennedy Company's mill site, six (6) chains and seventy-three (73) links to a post marked K. M. S. situate at southeast corner of said

Kennedy Company's mill site; thence south thirty-seven (37) degrees thirty-eight (38) minutes east seven (7) chains and five (5) links to post; thence south eighty-nine (89) degrees thirty-six (36) minutes west nine (9) chains and fifty-five (55) links to post
53 marked 46 hereinbefore described as situate at the southwest corner of said mill site; thence north nineteen (19) degrees fourteen (14) minutes west four (4) chains and three (3) links to the place of beginning, containing three (3) acres and ninety-nine-hundredths ($\frac{99}{100}$) of an acre of land, more or less, which together with the land claimed with said lode, aggregates twenty-two (22) acres and twenty-two-hundredths ($\frac{22}{100}$) of an acre of land, more or less, as represented by yellow shading in the following plat:

(Here follows plat.)

"'Now know ye, that the United States of America in consideration of the premises and in conformity with the said acts of Congress, have given and granted, and by these presents do give and grant, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns the said mining premises hereinbefore described as lot number forty-eight (48) embracing a portion of the northeast quarter of section twenty (20) in township six (6) north of range eleven (11) east Mt. Diablo meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred and eighty-nine and $\frac{94}{100}$ linear feet of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining, and of all the veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins,
54 lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey;

"'Provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits.

"'And provided further, that nothing in this conveyance shall authorize the grantees herein, their successors or assigns to enter upon the surface of a mining claim owned or possessed by another;

"'To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns forever, subject nevertheless, to the following conditions and stipulations:

"'First. That the grant hereby made is restricted to the land hereinbefore described as lot number forty-eight (48) with fifteen

hundred and eighty-nine and $\frac{94}{100}$ linear feet of the Pioneer quartz vein, lode, ledge or deposit throughout its entire depth as aforesaid together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie
55 inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of May eighteen hundred and seventy-two.

"'Second. That the premises hereby conveyed with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

"'Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

"'Fourth. That in the absence of necessary legislation by Congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

"'In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"'Given under my hand at the city of Washington the twelfth day of August in the year of our Lord one thousand eight
56 hundred and seventy-two and of the Independence of the United States the ninety-seventh.

"'By the President:

"'U. S. GRANT.

"'By Z. B. STURGESS,

"'*Ass't Secretary.*

"'[SEAL.]

C. B. BOYNTON,

"'*Recorder of the General Land Office.*

"'Recorded, vol. 4, pages 393 to 401.'

XVII.

"That attached to said several patents was a plat delineating the boundaries and surface lines described in said patents respectively. Said plat attached to said patent to said Kennedy Mining Company delineates the surface ground as the same is marked and designated on 'Exhibit A,' annexed hereto as lot forty-four (44) Kennedy quartz mine; and the plat annexed to said patent to said Pioneer Gold and Silver Mining Company delineates the surface ground described in said last-named patent as shown upon 'Exhibit A' annexed hereto, marked lot forty-eight (48) Pioneer quartz mine.

XVIII.

"That the line A—B marked upon the diagram 'Exhibit A' is the northern end line of said Pioneer quartz mine as patented, and to the extent of the length of said line, to wit: seven (7) chains and sixty (60) links, is coincident with the southern end line of said Kennedy quartz mine as described in said patent to said Kennedy Mining Company.

"The course of said line A—B is north seventy-four (74) degrees fifty-one (51) minutes east. The dotted line B—B' is said line A—B produced indefinitely in its own direction.

57

XIX.

"That said Argonaut Mining Company has sunk an incline shaft which has its collar or top in the Pioneer mill site described in said patent to said Pioneer Gold and Silver Mining Company at a point marked 'B' on said diagram 'Exhibit A,' and descends into the earth downward from its collar easterly at an average angle approximately sixty-two degrees from the plane of the horizon.

XX.

"Traversing said Kennedy and Pioneer mines in a general northerly and southerly direction is a ledge of rock in place bearing gold. It is a well-defined vein varying in width from three inches to thirty feet lying between well-defined walls, and dips and descends into the earth easterly at an average angle of approximately forty degrees from the plane of the horizon until it reaches a point in said Argonaut shaft about four hundred and forty feet below the collar or top thereof below which point said vein dips and descends into the earth easterly at an average angle of approximately sixty-three degrees from the plane of the horizon, the general easterly direction of said dip of said vein being indicated by the arrows on 'Exhibit A.'

XXI.

"The general course of said vein is S. 19° 14′ E or N. 19° 14′ W. as is apparent on the surface by the outcrop visible in said Pioneer mine lot 48. Said vein in its course southerly passes out of
58 said Kennedy quartz mine crossing said line A—B at a point thereon marked 'Z' on said 'Exhibit A,' and enters the Pioneer ground, thence pursuing its general southerly course towards the southern end line of said Pioneer quartz mine, which it crosses.

XXII.

"Within the surface boundary of the tract designated on 'Exhibit A' as the Kennedy mill site, and at the point marked 'X' on 'Exhibit A' the Kennedy Mining and Milling Company have sunk a shaft, which is vertical or nearly so to the depth of three hundred and seventy-six feet, or thereabouts, at which depth it encounters the vein or ledge above described, as it descends into the earth from the overlying apex or outcrop.

"Thence said shaft is an incline following the vein on its dip or downward course into the earth to a present depth of approximately two thousand two hundred and fifty feet.

XXIII.

"From said shaft the defendant herein has extended certain levels and drifts southerly on said vein, some of which are shown in horizontal projection on the diagram marked 'Exhibit A' hereto annexed and marked respectively 1450, 1550, 1650 and 1750 levels. Some of these levels have been by said defendant extended on said vein southerly and beyond a vertical plane drawn through the line A—B produced in the direction of B′.

"That between the 8th day of October, 1895, and the 12th day of December, 1895, the defendant extracted, removed and con-
59 verted to its own use two thousand six hundred and four (2,604) tons of gold-bearing ore from said vein southerly from and beyond said vertical plane, but within the vertical boundaries of the Silva quartz mine delineated on said Exhibit A, and hereinafter described.

"That the gross value of said 2,604 tons of said ore so extracted, removed and converted by defendant was the sum of sixty-two thousand two hundred and eighteen $\frac{45}{100}$ (62,218.45) dollars.

"That the aggregate cost of mining and milling said ore was the sum of six thousand one hundred and nineteen $\frac{40}{100}$ (6,119.40) dollars, which amount plaintiff consents may be deducted from the gross value of the ore as above stated, in the event the court should determine that plaintiff is entitled to recover in this action.

"The net profit realized by said defendant from said ore was the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold.

XXIV.

"That the vein exposed in defendant's underground workings south of the vertical plane drawn through the line A—B produced in the direction B′ is the same vein which has its top or apex in the Kennedy quartz mine and in the Pioneer quartz mine, and that such vein is continuous from the top or apex in both properties downward to the lowest depths, and that said vein at all points below the surface continues on its course in a general southerly direction indefinitely towards the south end line of the Pioneer quartz mine, which it crosses, and that the aforesaid 2,604 tons of ore were extracted by defendant from said vein south of said vertical plane drawn through the line A—B—B′.

60 XXV.

"Said vein is the identical vein mentioned in the Kennedy patent as the Kennedy vein or lode and in the Pioneer patent as the Pioneer vein or lode.

XXVI.

"That plaintiff became the owner of said Pioneer quartz mine by deed duly executed July 3, 1893, by the Pioneer Gold and Silver

Mining Company, the patentee named in the Pioneer patent hereinbefore described, and has ever since been and now is such owner.

XXVII.

"That the defendant became the owner of said Kennedy mine by mesne conveyances from the patentee by deed dated December 28th, 1886, and has ever since and now is such owner.

XXVIII.

"Delineated upon said diagram hereto annexed marked 'Exhibit A' is a property known as the Silva quartz mine, lot No. 86. The surface of said Silva quartz mine overlies so much of the dip of said Pioneer and Kennedy vein as may be found between vertical planes drawn downward through the boundaries of said Silva quartz mine. That the defendant is and ever since the sixth day of February, 1893, has been the owner of said Silva quartz mine by virtue of a quartz mining patent issued to it on that day under the
61 mining laws of Congress which patent is in the words and figures as follows, to wit:

"'General Land Office No., 22540; mineral certificate No. 1521.

"'The United States of America to all to whom these presents shall come, Greeting:

"'Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 1521, of the register of the land office at Sacramento, in the State of California, accompanied by other evidence, whereby it appears that the Kennedy Mining and Milling Company did, on the thirteenth day of October A. D. 1892, duly enter and pay for that certain mining claim or premises known as the Silva quartz lode mining claim, designated by the surveyor general as lot No. 86, embracing a portion of section twenty, in township six, north of range eleven east, Mt. Diablo meridian, in the Jackson mining district, in the county of Amador and State of California in the district of lands subject to sale at Sacramento and bounded, described and platted as follows, with magnetic variation as hereinafter stated.

"'Beginning at an iron post situate at the northeast corner of lot No. 61, the Volunteer quartz lode claim.

"'Thence, first course, magnetic variation sixteen degrees and thirty-five minutes east, north sixty degrees and thirty-one minutes east, thirty-five feet to a post marked "X."

62 "'Thence, second course, magnetic variation sixteen degrees and thirty-five minutes east, south thirty-five degrees and ten minutes east one hundred and sixty-seven feet to a post marked "IX."

"'Thence, third course, magnetic variation sixteen degrees and thirty-five minutes east, north eighty-nine degrees and forty-five minutes east one hundred and three feet to a post marked "VIII,"

from which a shaft bears south sixty-four degrees and twenty minutes east one hundred and twenty-six feet distant; and a shaft bears north fifty-six degrees and ten minutes east three chains and thirty-four links distant.

"'Thence, fourth course, magnetic variation, sixteen degrees, and twenty-five minutes east, north twenty-four minutes west four hundred and seventy feet to a post marked "VII."

"'Thence, fifth course, magnetic variation fifteen degrees and fifty-five minutes east, north eighty-nine degrees and twenty minutes east two hundred and thirteen and two-tenths feet to a post five inches square marked "V," in mound of stone, from which a blazed live oak five inches in diameter bears north fifty degrees and fifteen minutes east forty-three and one-half links distant; and the corner common to sections sixteen, seventeen, twenty and twenty-one, in township six north of range eleven east, Mount Diablo meridian bears north eighty-nine degrees and twenty minutes east ten chains distant.

"'Thence, sixth course, magnetic variation fifteen degrees and thirty-nine minutes east, south ten minutes east, one thousand three hundred and six and eight-tenths feet to a post marked "IV," being the southeast corner of claim.

63 "'Thence, seventh course, magnetic variation sixteen degrees and twenty-five minutes east, south eighty-nine degrees and twenty minutes west, six and six-tenths feet to an iron bar two inches in diameter, projecting three inches above ground, situate in a gateway.

"'Thence, eighth course, magnetic variation sixteen degrees and twenty-five minutes east, north thirty-one degrees and forty-eight minutes west, six hundred and sixty-three and three-tenths feet to a post marked "II."

"'Thence, ninth course, magnetic variation sixteen degrees and thirty-five minutes east, north twelve degrees and forty minutes west, three hundred and ninety-eight feet to said iron post, the place of beginning; said lot No. 86 extending one thousand three hundred and sixteen and seven-tenths feet in length, along said Silva quartz vein or lode, and containing seven acres and twenty-two-hundredths of an acre of land, more or less.

"'Now know ye, that there is therefore hereby granted by the United States unto the said Kennedy Mining and Milling Company and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Silva quartz vein, lode or ledge, and of all other veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 86 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of

64 possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No.

86, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

"'To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to its successors and assigns forever; subject nevertheless to the above mentioned, and to the following conditions and stipulations:

"'First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

"'Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

65 "'Third. That in the absence of necessary legislation by Congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

"'In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"'Given under my hand at the city of Washington the sixth day of February in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

"'By the President:

"'BENJAMIN HARRISON.

"'By E. MACFARLAND,

"' *Ass't Secretary.*

"'[Seal of the U. S. Gen. L. O.]

"'D. P. ROBERTS,

"' *Recorder of the Gen. Land Office.*

"'Recorded vol. 234, pages 57 to 60 inclusive.'

"It is now stipulated and agreed that this cause be forthwith submitted to the court upon the foregoing agreed statement of facts and stipulations together with the facts established by the pleadings,

for its decision upon the respective rights of the parties and for judgment accordingly.

"Nothing herein shall be construed to deprive either party of the right to appeal or sue out a writ of error to the appropriate tribunal having jurisdiction for the purpose of reviewing any judgment which may be entered pursuant to decision rendered as con-
66 templated in this stipulation, but the right to have said judgment reviewed by the appellate courts by appropriate proceedings in that behalf is expressly reserved by both parties.

"Dated, September 13th, 1898.

"LINDLEY & EICKHOFF,
"W. J. McGEE,
"F. J. SOLINSKY,
"*Attorneys for Plaintiff.*
"JOHN M. WRIGHT,
"BYRON WATERS,
"JOHN J. SNYDER,
"*Attorneys for Defendant.*

"(Endorsed:) Formerly No. 1408 in the superior court of Amador county. In the superior court of Calaveras county, State of California. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining & Milling Company, defendant. Agreed statement of facts. Filed Sept. 14, 1898. A. L. Wyllie, clerk, by W. S. Coulter, deputy."

(Here follows map marked page 66*a*.)

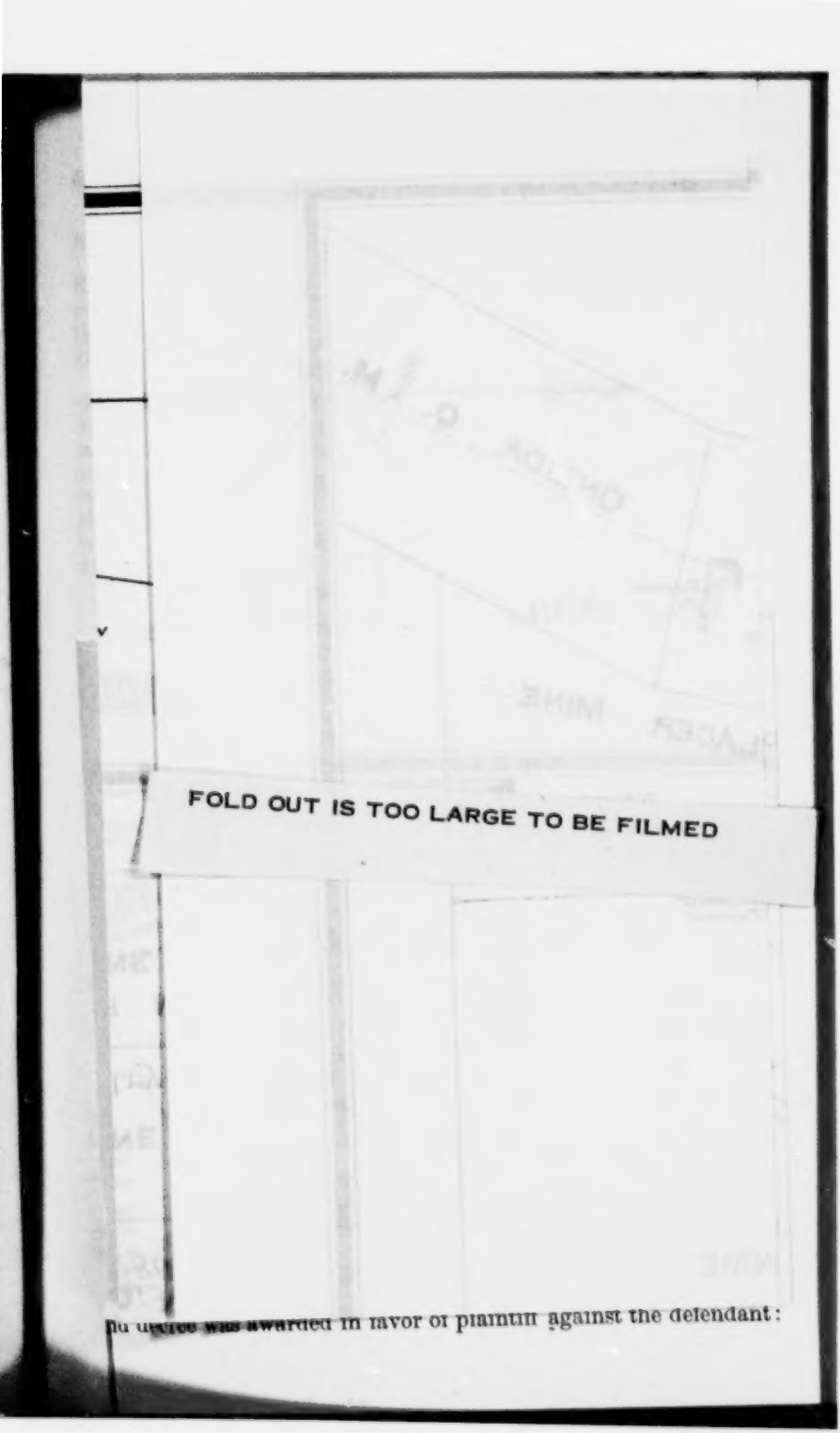
67 As to conclusions of law from said agreed statement of facts, the court finds:

I.

That the plaintiff, Argonaut Mining Company, is and at all times mentioned in the complaint was the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had, and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine.

II.

That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful.



No decree was awarded in favor of plaintiff against the defendant:

and the extraction of ore therefrom as set forth in said agreement of facts, was wrongful and unlawful.

68 III.

That the plaintiff is entitled to judgment and decree of this court, as follows:

(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold together with interest thereon from September 14th, 1898, at the rate of seven per cent. per annum, also costs of suit.

(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its own direction eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to be run or extended thereon any drifts, levels, stopes or mining works of any kind.

Let the judgment be entered accordingly.

Dated March 27th, 1899.

G. W. NICOL,
Presiding Judge.

(Endorsement:) No. 1408. State of California, county of
69 Calaveras. In the superior court. Argonaut Mining Company (a corporation), plaintiff, *vs.* Kennedy Mining & Milling Company (a corporation), defendant. Decision. Filed March 29, 1899. J. S. Jack, clerk.

Judgment.

In the Superior Court of Calaveras County, State of California.

ARGONAUT MINING COMPANY, Plaintiff, *vs.* KENNEDY MINING AND MILLING COMPANY, Defendant.	Formerly No. 1408 in the Superior Court of Amador County.

Judgment.

This cause came on regularly for trial on September 14th, 1898; Messrs. Lindley & Eickhoff, W. J. McGee and F. J. Solinsky appeared for plaintiff, and Messrs. John M. Wright, Byron Waters and John J. Snyder appeared for the defendant.

70 Thereupon said cause was submitted to the court for its decision upon an agreed statement of facts in writing pursuant to a stipulation in writing signed in that behalf by counsel for the respective parties.

And the court, having made its decision and conclusions of law in writing, which are now on file in this cause, wherein judgment and decree was awarded in favor of plaintiff against the defendant:

It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit taxed at $260.00.

It is further ordered, adjudged and decreed that the defendant, Kennedy Mining and Milling Company, its agents, servants, attorneys and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly, and from extracting or removing from any portion of said vein so lying between said vertical planes, any ore, rock or other material,
71 and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit, the north end line being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof.

Dated this 27th day of March, 1899.

G. W. NICOL,
Judge Presiding.

(Endorsed:) Formerly No. 1408, Amador county. In the superior court of Calaveras county, State of California. Argonaut Mining Company, plaintiff, *v.* Kennedy Mining and Milling Co., defendant. Judgment. Filed March 29, 1899. J. S. Jack, clerk.

72 *Certificate to Judgment-roll.*

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

We, the undersigned, attorneys for the above-named plaintiff and defendant respectively, do hereby certify the above and foregoing to be a true and correct transcript of the following-named papers filed in the above-entitled action, to wit, the complaint, the answer, the stipulation for entry of order changing place of trial, the order transferring the cause to Calaveras county for trial, the decision of the court and the judgment, said judgment being as entered and recorded in said action at page 167 of Judgment Book No. 3 of the superior court of Calaveras county, California.

And we further certify that said papers constitute the judgment-roll in said action.

Dated the 11th day of August, 1899.

LINDLEY & EICKHOFF,
WILLIAM J. McGEE,
F. J. SOLINSKY,
Attorneys for Plaintiff.
JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant.

73 *Notice of Appeal.*

In the Superior Court of the County of Calaveras, State of California.

ARGONAUT MINING COMPANY, Plaintiff, *vs.* KENNEDY MINING AND MILLING COMPANY, Defendant.	Cause No. 1408. Notice of Appeal.

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of California, from the final judgment therein given, made and entered in the said superior court, on the 29th day of March, 1899, in favor of the plaintiff in said action, and against said defendant, and from the whole of said judgment.

Yours, &c.,

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for said Defendant.

74 To the clerk of said superior court, and to Lindley & Eickhoff, W. J. McGee, and F. J. Solinsky, Esqrs., attorneys for plaintiff.

Dated this seventeenth day of May, A. D. 1899.

(Endorsed:) Service and receipt of a notice similar to the within notice of appeal is hereby admitted this seventeenth day of May, 1899. Lindley & Eickhoff, W. J. McGee, and F. J. Solinsky, attorneys for plaintiff.

(Endorsed:) No. 1408. Superior court, county of Calaveras. Argonaut Mining Company, plaintiff, *v.* Kennedy Mining and Milling Company, defendant. Notice of appeal. Filed May 19, 1899. J. S. Jack, clerk, by —— ——, deputy clerk. John M. Wright and Byron Waters, attorneys for defendant.

75 *Undertaking for Costs and Damages on Appeal.*

In the Superior Court of the County of Calaveras, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant.
} No. 1408. Undertaking for Costs and Damages on Appeal.

Whereas, the defendant in the above-entitled action is about to appeal to the supreme court of the State of California, from a final judgment entered against it in said action in said superior court in favor of the plaintiff in said action, on the 29th day of March, 1899, for fifty-eight thousand two hundred and thirty-nine and $\frac{85}{100}$ dollars and two hundred and sixty dollars costs of suit. (Said judgment also awarding to plaintiff a perpetual injunction against defendant, restraining defendant from mining any ore from within certain boundaries of the vein described in said judgment as the Pioneer or Argonaut vein):

Now, therefore, in consideration of the premises, and of
76 such appeal, we, the undersigned, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

C. S. BENEDICT. [SEAL.]
GEORGE GOODMAN. [SEAL.]

Dated this twentieth day of May, 1899.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

C. S. Benedict and Geo. Goodman, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself, says: That he is a resident and freeholder within said State of California, and is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. S. BENEDICT.
GEORGE GOODMAN.

Subscribed and sworn to before me this 20th day of May, 1899.

[Notarial Seal of Geo. T. Knox.]

GEO. T. KNOX,
Notary Public in and for the City and County of San Francisco, State of California.

77 (Endorsed:) No. 1408. Superior court, county of Calaveras. Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling Company, defendant. Appeal. Undertaking for costs and damages. Filed May 22, 1899. J. S. Jack, clerk, by —— ——, deputy clerk.

Bill of Exceptions.

In the Superior Court of the County of Calaveras and State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

Be it remembered: That on the 14th day of September, 1898, this cause came on for trial before Honorable G. W. Nicol, judge of the superior court of the county of Tuolumne in said State, sitting in and for said county of Calaveras at the request of Honorable
78 C. V. Gottschalk, judge of the superior court of said county of Calaveras, upon:

First. The complaint of the plaintiff;

Second. The answer of the defendant;

Third. The agreed statement of facts and stipulation submitting cause;

Fourth. Stipulation extending time for filing objections; and

Fifth. Defendant's objections to certain facts in the said agreed statement;

All of which documents appear in the judgment-roll on file herein, except the fourth, to wit, the stipulation extending time for filing objections, and the fifth, to wit, defendant's objections to certain facts in the agreed statement, each of which is hereinafter set forth.

Said stipulation extending time for filing objections, signed by the respective attorneys for plaintiff and defendant, and filed herein, is in the words and figures following, to wit:

"In the Superior Court of the County of Calaveras, State of California.

"ARGONAUT MINING COMPANY, Plaintiff,
"*vs.*
"KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

79 "*Stipulation Extending Time for Filing Objections.*

"Whereas, by stipulation heretofore made herein, a certain statement of the facts in this case was agreed upon; and

"Whereas, in said stipulation it was provided that 'each or either party may serve on the opposite party and file in this cause within twenty days from this date' (Sept. 13th, 1898) 'a statement in writing setting forth specifically its objections to each fact the ad-

mission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled upon by the court the same as though made in open court or as though specifically set forth in this stipulation':

"Now it is hereby stipulated and agreed that the time for serving and filing such objections is hereby extended to and to include the 12th day of October, 1898.

"LINDLEY & EICKHOFF,
"W. J. McGEE, AND
"F. J. SOLINSKY,
"*Attorneys for Plaintiff.*
"JOHN M. WRIGHT,
"BYRON WATERS,
"JOHN J. SNYDER,
"*Attorneys for Defendant.*

"(Endorsement:) No. 1408. In the superior court of the
80 county of Calaveras, State of California. Argonaut Mining Co., plaintiff, *v.* Kennedy Mining and Milling Company, defendant. Stipulation extending time for filing objections. Filed October 4th, 1898. A. L. Wyllie, clerk."

That within the time allowed by the foregoing stipulation the defendant served upon plaintiff and filed herein defendant's objections to certain of the facts stated in the said agreed statement of facts, which objections as so served and filed were and are as follows, to wit:

"In the Superior Court of the County of Calaveras, State of California.

"ARGONAUT MINING COMPANY, Plaintiff,
vs.
"KENNEDY MINING AND MILLING COMPANY, Defendant. } No. 1408.

"*Defendant's Objections.*

"Whereas, by stipulation heretofore made herein, a certain statement of the facts in this cause was agreed upon; and
"Whereas, in said stipulation it was provided that 'each or either party may serve on the opposite party and file in this cause within twenty days from this date' (Sept. 13th, 1898,) 'a statement
81 in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of

objections shall be deemed and taken as part of the record of the cause, and the objections therein stated shall be ruled upon by the court the same as though made in open court or as though specifically set forth in this stipulation.'

"Now in accordance with the right so stipulated and reserved, this defendant hereby specifically sets forth, makes and claims its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of those certain facts specified in said agreed statement as follows, to wit:

"First. All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;

"Second. All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy quartz mine, lot No. 44, and that a diagram of said mine was posted in the U. S. land office at Sacramento, California, on October 15, 1870;

82 "Third. All and singular each and every the facts stated in paragraph VII of said agreed statement, showing among other matters and things that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the register and receiver of the land office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

"Fourth. All and singular each and every the facts stated in paragraph VIII of said agreed statement, showing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. land office at Sacramento, California, said agreement being set forth *in hæc verba* in said paragraph VIII;

"Fifth. All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things that on March 15, 1871, the U. S. surveyor general for California instructed William L. McKim, a U. S. deputy mineral surveyor, to make patent survey of said Kennedy quartz mine;

"Sixth. All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy quartz mine during April and May, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on October 19,

83 1871, said surveyor general approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed.

"Defendant bases its aforesaid objections to the admission as evi-

dence herein of the facts aforesaid upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy quartz mine, lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

"(*c.*) All and singular each and every the facts so objected to, relate only to the surface area to be embraced within said Kennedy quartz mine, lot No. 44, and in nowise relate to any extra lateral right claimed as attaching to said Kennedy quartz mine, lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 44; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and the Pioneer quartz mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Kennedy quartz mine, nor was said agreement ever recorded in the office of the county recorder of the
84 county of Amador, State of California, in which said Kennedy quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to the Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

"(*e.*) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, are irrelevant and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva quartz mine, and without the vertical end boundaries of said Kennedy quartz mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva quartz mine, lot No. 86, which ownership is shown by the facts set forth in paragraph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva quartz mine was issued, to wit, under chapter six of title thirty-two of the Revised Statutes of the United States and legisla-
85 tion supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance

embraced within the area of said Silva quartz mine as described in said Silva patent; and

"(*f.*) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy quartz mine, lot No. 44.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Seventh. All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on June 29, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for said Kennedy quartz mine, lot No. 44, said patent being set forth *in hæc verba* in said paragraph XI;

"Eighth. All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such facts show or tend to show that on December 28, 1886, said Kennedy Mining Company conveyed to this defendant all the property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872.

"Defendant bases its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

86 "(*a.*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine, nor by showing the limitations of the patent to said Kennedy quartz mine; but plaintiff must rely upon and clearly show its own title to said ores; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva quartz mine, lot No. 86, and not by reason of its ownership of said Kennedy quartz mine, lot No. 44.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Ninth. All and singular each and every the facts set forth in paragraph XVII of said agreed statement, and the facts shown by the plat designated as 'Exhibit A' in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy quartz mine, lot No. 44;

"Tenth. All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such
87 facts show or tend to show the southern end line of said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the southern end line of said Kennedy quartz mine;

"Eleventh. All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy quartz mine, lot No. 44, and the nature and extent of said vein within said Kennedy quartz mine;

"Twelfth. All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in said Kennedy quartz mine, lot No. 44, and that said vein crosses out of said Kennedy quartz mine into said Pioneer quartz mine;

"Thirteenth. All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy quartz mine or the identity of such vein or any vein in said Kennedy mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B′ but within the vertical boundaries of said Silva quartz mine, lot No. 86;

"Fourteenth. All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy quartz mine on December 28, 1886, and ever since has been and now is such owner.

"And defendant bases its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in
88 said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer quartz mine, lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva quartz mine, lot No. 86, and not by reason of its ownership of Kennedy quartz mine, lot No. 44.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Fifteenth. All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer quartz mine, lot No. 48, and that a diagram of said Pioneer quartz
89 mine was posted in the U. S. land office at Sacramento, California, and on said Pioneer mine.

"Sixteenth. All and singular each and every the facts stated in paragraph VII of said agreed statement, showing among other mat-

ters and things, that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the register and receiver of the land office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

"Seventeenth. All and singular each and every the facts stated in paragraph VIII of said agreed statement, showing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. land office at Sacramento, California, said agreement being set forth *in hæc verba* in said paragraph VIII;

"Eighteenth. All and singular each and every the facts set forth in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. surveyor general for California instructed said William L. McKim to make patent survey of said Pioneer quartz mine;

"Nineteenth. All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent
90 survey of said Pioneer quartz mine on September 1, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on December 21st, 1871, said surveyor general approved said survey, the aforesaid return of such survey of said Pioneer quartz mine being set forth *in hæc verba* in said paragraph XIV of said agreed statement;

"Twentieth. All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things, that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer quartz mine as so surveyed by said William L. McKim, and that the receiver of said U. S. land office thereupon issued his duplicate receipt evidencing such entry and payment.

"Defendant bases its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer quartz mine, lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and
91 "(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said

Pioneer quartz mine, lot No. 48, and in nowise relate to any extra-lateral right claimed as attaching to said Pioneer quartz mine, lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 48; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and said Pioneer quartz mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Pioneer quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to said Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement.

"Defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said
92 Pioneer Gold and Silver Mining Company the Pioneer quartz mine, lot No. 48, as the same is described in said letters patent, a copy of which is set forth *in hæc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;

"Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed statement, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof.

"Defendant bases its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer quartz mine, lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: Although it is true that the ores in dispute herein were all extracted by defendant from the vein

mentioned in the complaint herein and in said agreed state-
93 ment and in said Pioneer patent as the 'Pioneer vein,' and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively. It is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly
94 being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said vertical east side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer

quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48 should or could attach
95 to said lot No. 48 and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

"(*b.*) All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer quartz mine, lot No. 48, and defendant specially sets up and claims that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant
96 more than nine hundred feet from said lot No. 48,—therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States' under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer quartz mine, lot No. 48, as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

"(*c.*) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(*d.*) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only 1,589.94 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1,589.94 linear feet
97 thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1,589.94 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that, even though the grant of 1,589.94 linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

"(*e.*) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein,
98 said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48, which is definable by reference to the boundaries of said lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent.

"And defendant in like manner objects to the admission as evidence herein of the following additional facts, to wit:

"Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1,450, 1,550, 1,650 and 1,750 levels south of a vertical plane drawn down through the north end line of said lot No. 48 extended indefinitely in its own direction north seventy-four (74) degrees and fifty-one (51)
99 minutes east, and that between October 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said Pioneer vien southerly from said vertical plane but within the vertical boundaries of said Silva quartz mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;

"Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'.

"Defendant bases its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: although it is true that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 throughout the entire length of said lot and midway between the side lines thereof to the center of the north end line
100 thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraphs XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No 48, are not parallel to each other,

but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends
101 downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by reference to said paragraph XXIII and to said 'Exhibit A,' all of said ores were extracted outside of and far easterly from said lot No. 48 and at points where vertical planes drawn down through the end lines of said lot No. 48 extended in their own directions respectively, are distant from each other more than 1,900 feet, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying
102 outside the vertical boundaries of said lot No. 48, should or could attach to said Pioneer quartz mine, and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an

extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and therefore said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, and therefore did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to said plaintiff; and

"(*b.*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said lot No. 48 and within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto,
103 and defendant specially sets up and claims that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said lot No. 86, and defendant further under said statutes and legislation of the United States, specially sets up and claims immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof, and defendant further specially sets up and claims immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48, and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48. Therefore, and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, en-
104 titled 'An act to promote the development of the mining resources of the United States,' under which the U. S. patent to said lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86, or any thereof; and

"(*c.*) All the ores in dispute herein were extracted by defendant

from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(*d.*) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1,589.94 linear feet of said Pioneer vein with the exclusive right to said 1,589.94 linear feet of said vein throughout its entire depth although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1,589.94 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1,589.94 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said
105 complaint whether it is the intention of plaintiff to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

"(*e.*) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said lot No. 48, such part so defined must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said complaint, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein,
106 parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48 which

is definable by reference to the boundaries of said lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint.

"And this defendant specially sets up and claims that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by plaintiff to the ores in question by reason of its ownership of the Pioneer quartz mine, lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva quartz mine, lot No. 86, is involved: First, the construction of the act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under the provisions of which plaintiff acquired its title to said lot No. 48; and, second, the construction of chapter six of title thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said lot No. 86.

107 "And all and singular each and every of such objections are so specially set up and claimed by defendant so as to apprise the court that the Federal questions so involved are presented for its consideration and decision.

"JOHN M. WRIGHT,
"BYRON WATERS,
"JOHN J. SNYDER,
"*Attorneys for Defendant.*

"(Endorsed:) No. 1408. In the superior court of the county of Calaveras, State of California. Argonaut Mining Company (a corporation), plaintiff, *vs.* Kennedy Mining and Milling Company (a corporation), defendant. Defendant's objections to certain facts in the agreed statement. Service of the within by delivery of a copy thereof admitted this 11th day of October, 1898. Lindley & Eickhoff, W. J. McGee, F. J. Solinsky, attorneys for plaintiff. Filed this 12th day of October, 1898. A. L. Wyllie, clerk, by W. S. Coulter, deputy clerk."

Whereupon, at the trial of this cause the following proceedings were had and the following exceptions reserved by defendant, namely: Prior to the submission of the cause to the court for its decision, defendant specially made, set up and claimed all and singular each and every the several objections stated and contained in the statement of objections hereinbefore set forth, so as to apprise the court that the Federal and other questions so raised and involved therein were presented for consideration and decision by the court; and all and singular each and every the said objections so

108 made as aforesaid, were by the court ruled upon in the manner hereinafter set forth, prior to the rendition of its decision upon the merits of the cause, by which said rulings of the court all

and singular each and every the said objections of defendant were overruled and denied, excepting those numbered third, fourth, sixteenth and seventeenth and such other of defendant's said objections as refer to the facts set forth in paragraphs seven (7) and eight (8) of said agreed statement of facts. And to all and singular each and every the said rulings of the court overruling and denying such objections aforesaid of the defendant, the defendant did duly except, and the action of the court in that behalf and the exceptions thereto of the defendant are here and now in this bill of exceptions made of record and set out seriatim as follows:

Objection and Exception No. 1.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"First. All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;"

which said objection was overruled by the court, to which
109 ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 1.

Objection and Exception No. 2.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Second. All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy quartz mine, lot No. 44, and that a diagram of said mine was posted in the U. S. land office at Sacramento, California, on October 15, 1870;"

which said objection was overruled by the court; to which ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 2.

5th Objection and Exception No. 3.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifth. All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things, that on March 15, 1871, the U. S. surveyor general for California instructed William L. McKim, a U. S. deputy
110 mineral surveyor, to make patent survey of said Kennedy quartz mine;"

which said objection was overruled by the court; to which ruling

the defendant did duly except and hereby makes the same of record as the defendant's exception No. 3.

6th Objection and Exception No. 4.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Sixth. All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy quartz mine during April and May, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on October 19, 1871, said surveyor general approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed."

Defendant based its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected
111 to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy quartz mine, lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

"(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Kennedy quartz mine, lot No. 44, and in nowise relate to any extra-lateral right claimed as attaching to said Kennedy quartz mine, lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 44; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and the Pioneer quartz mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Kennedy quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Kennedy quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to the Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

"(*e.*) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII,
VIII, IX and X of said agreed statement, are irrelevant
112 and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove

any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva quartz mine, and without the vertical end boundaries of said Kennedy quartz mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva quartz mine, lot No. 86, which ownership is shown by the facts set forth in paragraph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva quartz mine was issued, to wit, under chapter six of title thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance embraced within the area of said Silva quartz mine as described in said Silva patent; and

"(*f.*) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy quartz mine, lot No. 44."

Said 6th objection, excepting in so far as the same relates
113 to paragraphs seven (7) and eight (8) of said agreed statement, was overruled by the court, to which ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 4.

7th Objection and Exception No. 5.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Seventh. All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on July 29, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for said Kennedy quartz mine, lot No. 44, said patent being set forth *in hæc verba* in said paragraph XI;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 5.

8th Objection and Exception No. 6.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eighth. All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such
114 facts show or tend to show that on December 28, 1886, said Kennedy Mining Company conveyed to this defendant all the

property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872."

Defendant based its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine, nor by showing the limitations of the patent to said Kennedy quartz mine; but plaintiff must rely upon and clearly show its own title to said ores; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva quartz mine, lot No. 86, and not by reason of its ownership of said Kennedy quartz mine, lot No. 44."

Said eighth objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 6.

115 *9th Objection and Exception No. 7.*

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Ninth. All and singular each and every the facts set forth in paragraph XVII of said agreed statement, and the facts shown by the plat designated as 'Exhibit A' in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy quartz mine, lot No. 44;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 7.

10th Objection and Exception No. 8.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Tenth. All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such facts show or tend to show the southern end line of said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the southern end line of said Kennedy quartz mine;"

116 which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 8.

11th Objection and Exception No. 9.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eleventh. All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy quartz mine, lot No. 44, and the nature and extent of said vein within said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 9.

12th Objection and Exception No. 10.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twelfth. All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in
117 said Kennedy quartz mine, lot No. 44, and that said vein crosses out of said Kennedy quartz mine into said Pioneer quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 10.

13th Objection and Exception No. 11.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Thirteenth. All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy quartz mine or the identity of such vein or any vein in said Kennedy mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B′ but within the vertical boundaries of said Silva quartz mine, lot No. 86;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 11.

14th Objection and Exception No. 12.

At said trial the defendant specifically set forth, made and
118 claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fourteenth. All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy quartz mine on December 28, 1886, and every since has been and now is such owner.

And defendant based its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer quartz mine, lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva quartz mine, lot No. 86, and not by reason of its ownership of Kennedy quartz mine, lot No. 44."

119 Said 14th objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 12.

15th Objection and Exception No. 13.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifteenth. All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer quartz mine, lot No. 48, and that a diagram of said Pioneer quartz mine was posted in the U. S. land office at Sacramento, California, and on said Pioneer mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 13.

18th Objection and Exception No. 14.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"Eighteenth. All and singular each and every the facts set
120 forth in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. surveyor general for California instructed said William L. McKim to make patent survey of said Pioneer quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 16.

19th Objection and Exception No. 15.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Nineteenth. All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent survey of said Pioneer quartz mine on September 1, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on December 21, 1871, said surveyor general approved said survey, the aforesaid return of such survey of said Pioneer quartz mine being set forth *in hæc verba* in said paragraph XIV of said agreed statement;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 15.

121 *20th Objection and Exception No.* 16.

At said trial the defendant specifically set forth, made and claimed its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twentieth. All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer quartz mine as so surveyed by said William L. McKim, and that the receiver of said U. S. land office thereupon issued his duplicate receipt evidencing such entry and payment."

Defendant based its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to are

immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer quartz mine, lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and

122 "(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Pioneer quartz mine, lot No. 48, and in nowise relate to any extra-lateral right claimed as attaching to said Pioneer quartz mine, lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 48; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and said Pioneer quartz mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Pioneer quartz mine is situate, nor is it allaged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to said Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement."

Said twentieth objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 16.

21st Objection and Exception No. 17.

123 At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pioneer Gold and Silver Mining Company the Pioneer quartz mine, lot No. 48, as the same is described in said letters patent, a copy of which is set forth *in hæc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 17.

22nd Objection and Exception No. 18.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed statement, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof."

124 Defendant based its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer quartz mine, lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: Although it is true that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the 'Pioneer vein,' and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true

125 that as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89)

degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot
126 No. 48 and from said vertical east line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48 should or could attach to said lot No. 48 and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or inter-
127 est in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

"(*b.*) All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer quartz mine, lot No. 48, and defendant specially sets up and claims that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not paraliel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent

of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48,—therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States' under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of
128 said Pioneer vein which lies outside of the vertical boundaries of said Pioneer quartz mine, lot No. 48 as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

"(c.) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(d.) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only 1,589.94 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1,589.94 linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1,589.94 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and
129 next southerly from the north end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that, even though the grant of 1,589.94 linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

"(c.) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from
130 the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48, which is definable by reference to the boundaries of said lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent."

Said 22nd objection was overruled by the court, to which ruling the defendant did duly except and hereby makes the same of record as the defendant's exception No. 18.

23*rd Objection and Exception No.* 19.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1,450, 1,550, 1,650 and 1,750 levels south of a vertical plane drawn down through the north end line of said lot No. 48 extended indefinitely in its own direction north seventy-four (74) degrees and fifty-one (51) minutes east, and that between October 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said
131 Pioneer vein southerly from said vertical plane, but within the vertical boundaries of said Silva quartz mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;"

which said objection was overruled by the court, to which the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 21.

24th Objection and Exception No. 20.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'."

Defendant based its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every
132 the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: Although it is true that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 throughout the entire length of said lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the ex-
133 tent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts seth forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed state-

ment, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by reference to said paragraph XXIII and to said 'Exhibit A' all of said ores were extracted outside of and far easterly from said lot No. 48 and at points where vertical planes drawn down through the end lines of said lot No. 48 extended in their own directions respectively, are distant from each other more than 1,900 feet, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and

134 more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, should or could attach to said Pioneer quartz mine, and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and therefore said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, and therefore did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to said plaintiff; and

135 "(*b.*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said lot No. 48 and within the vertical boundaries of defendant's silver quartz mine,

lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and defendant specially sets up and claims that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said lot No. 86, and defendant further under said statutes and legislation of the United States, specially sets up and claims immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof and defendant further specially sets up and claims immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each
136 other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48. Therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under which the U. S. patent to said lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86, or any thereof; and

"(c.) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(d.) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1,589.94 linear feet of said
137 Pioneer vein with the exclusive right to said 1,589.94 linear feet of said vein throughout its entire depth although

it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1,589.94 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1,589.94 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint whether it is the intention of plaintiff to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

"(*e.*) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said lot No. 48, such part so defined must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said com-
138 plaint, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48 which is definable by reference to the boundaries of said lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint."

Said 24th objection was overruled by the court; to which ruling the defendant did duly except, and hereby makes the same of record as the defendant's exception No. 20.

Exception No. 21.

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 1, as follows:

"That the plaintiff, Argonaut Mining Company, is and at
139 all times mentioned in the complaint was, the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine;"

and makes such exception of record herein as defendant's exception No. 21.

Exception No. 22

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 2, as follows:

"That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and the said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful;"

and makes such exception of record herein as defendant's exception No. 22.

140 *Exception No. 23.*

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 3, as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold, together with interest thereon from September 14th, 1898, at the rate of seven per cent. per annum, also costs of suit;"

and makes such exception of record herein as defendant's exception No. 23.

Defendant's Exception No. 24.

The defendant also excepts to that part of the decision of the court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its own di-

rection eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to
141 be run or extended thereon any drifts, levels, stopes or mining works of any kind;"

and makes such exception of record herein as defendant's exception No. 24.

Exception No. 25.

Defendant also excepts to that part of the judgment rendered herein, as follows:

"It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit, taxed at $260;"

and hereby makes such exception of record as defendant's exception No. 25.

Exception No. 26.

Defendant also excepts to that part of the judgment herein as follows:

"It is further ordered, adjudged and decreed that the defendant, Kennedy Mining and Milling Company, its agents, servants, attorneys and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly, and from extracting or removing from any portion of said vein
142 so lying between said vertical planes, any ore, rock or other material, and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit: the north end line, being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof;"

and hereby makes such exception of record herein as defendant's exception No. 27.

The foregoing draft of defendant's bill of exceptions is this third day of July, 1899, and within the time allowed therefor by order of the court and by stipulation of the parties, hereby presented and served upon plaintiff as being the defendant's bill of exceptions herein.

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant.

Endorsements.

Service of the within defendant's bill of exceptions on plaintiff and receipt of a copy thereof by plaintiff on this the third
143 day of July, 1899, is hereby acknowledged and admitted by plaintiff. Lindley & Eickhoff, W. J. McGee, Frank J. Solinsky, attorneys for plaintiff.

It is hereby stipulated and agreed that the within draft may be presented for settlement and allowance on or before July 20, 1899, and that the same may be settled and allowed by the judge who tried said cause as the defendant's bill of exceptions on appeal in said cause, dated July 10, 1899. Lindley & Eickhoff, W. J. McGee, and F. J. Solinsky, attorneys for plaintiff. John M. Wright, Byron Waters, attorneys for defendant.

The within bill of exceptions, having been agreed upon by the parties to the within-named action, by a written stipulation and agreement duly endorsed thereon, is hereby settled and allowed as defendant's bill of exceptions on appeal in said action, to wit, the action wherein Argonaut Mining Company is plaintiff and Kennedy Mining and Milling Company is defendant, and numbered as number 1408. Dated July 20, 1899. G. W. Nicol, judge, presiding.

No. 1408. In the superior court of the county of Calaveras, State of California. Argonaut Mining Company, plaintiff, *v.* Kennedy Mining and Milling Company, defendant. Defendant's bill of exceptions. Filed July 22, 1899. J. S. Jack, clerk.

144 *Attorneys' Certificate to Transcript.*

In the Superior Court of Calaveras County, State of California.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY (a Corporation), Defendant. } No. 1408.

We, the undersigned attorneys for the above-named plaintiff and defendant respectively, do hereby certify the above and foregoing to be a true and correct transcript of the record in the above-entitled action, said transcript including a transcript of the following papers filed in said action, to wit, the complaint, the answer, the stipulation for entry of order changing place of trial, the order transferring the cause to Calaveras county for trial, the decision of the court, and the judgment (together constituting the judgment-roll), the de-
145 fendant's notice of appeal, the defendant's undertaking for costs and damages on appeal, and defendant's bill of exceptions.

And we further certify to the sufficiency of defendant's said undertaking for costs and damages on appeal.

Dated the 11th of August, A. D. 1899.

LINDLEY & EICKHOFF,
WM. J. McGEE,
F. J. SOLINSKY,
Attorneys for Plaintiff.
JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant.

146 Appeal from superior court of Calaveras county.—G. W. Nicol, judge.

For appellant, John M. Wright, Byron Waters.

For respondent, Lindley & Eickhoff, Wm. J. McGee and F. J. Solinsky.

Filed December 19, 1900.

In Bank.

ARGONAUT MINING COMPANY (a Corporation), Plaintiff and Respondent,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant and Appellant.
} Sac. No. 733.

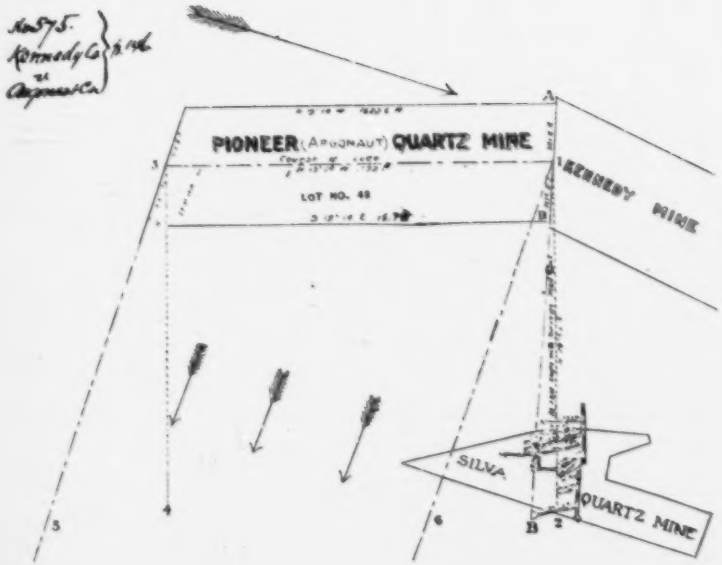
This is an action for damages for the value of ore alleged to have been taken by defendant from plaintiff's mine, situate in Amador county. The defendant denies taking any ore, or gold-bearing rock, from plaintiff's mine, and avers that defendant is the owner of the mine from which the rock was taken.

The cause was submitted in the trial court upon an agreed statement of facts, each party having the right to object to the relevancy, competency and materiality of any part of it. Certain objections to evidence were made by the appellant, which were overruled by the court, and the main argument here has been in regard to these rulings. Much of the evidence was objected to simply upon the ground of immateriality. All that I deem it necessary to say in regard to such rulings is that, admitting that the trial court erred as I am inclined to think it did, defendant has suffered no harm. The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence.

The controversy is indicated by the following diagram:

(Here follows diagram marked p. 146.)

The plaintiff owns the Pioneer quartz mine, the defendant owns the Kennedy mine and the Silva mine. All three mines had passed to patent before the ore was taken out by defendant. The ore was taken under the Silva location, and within its exterior limits carried vertically down. It was taken from the discovery lode of the Pio-


PIONEER (ARGONAUT) QUARTZ MINE
LOT NO. 48
LEZERBY MINE
SILVA
QUARTZ MINE
A
B
1
2
3
4
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neer location, which is the only lode which has its apex within that location. It enters that location near the middle point of the southern end line, and runs northerly through the location in a direction practically parallel to the side lines, through the center of the northern end line. In fact, save that the end lines are not parallel, the location and the lode are the ideals upon which the rules and regulations of miners and the laws of Congress seem to have been based.

The defendant does not assert any right to the ore in dispute by virtue of its ownership of the Kennedy mine, and nothing further need be said about it. Defendant asserts title to the ore by reason of its ownership of the Silva ground, under what counsel call the common-law right to everything beneath the surface. It admits plaintiff's ownership of the Pioneer mine, and that the lode has its apex, as stated, within its surface location, but denies that the quartz taken by it from that lode is within that location. This is asserted, as I understand the contention, upon two grounds: First, defendant contends that because of non-parallelism of the end lines of the Pioneer, it carries no extra-lateral rights; and, second, if the court can as matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel will be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The dip of the lode is easterly at an angle of about sixty degrees from the plane of horizon, and the end lines of the Pioneer diverge in that direction to the extent of about 14° 45′. The ore was taken out directly beneath the Silva surface location at depths varying from fourteen hundred to two thousand feet beneath the surface. The Silva location is more than nine hundred feet easterly from the easterly line of the Pioneer location.

The Pioneer was located, as the patent shows, under the law of 1866. The application for a patent was filed January 13, 1871. On the 23rd day of February, 1872, the Pioneer entered and paid for its mine, and the patent is dated August 12, 1872. The act to promote the development of the mining resources of the United States was passed May 10, 1872.

For reasons, which will appear as this opinion proceeds, I think plaintiff is entitled to all the rights which would attach to such a location under the law of 1866, and to any additional rights which inured to such locations under the act of 1872.

Among the contentions of the respondent is this: "Although the end lines were not required to be parallel under the act of 1866, yet if by any process of reasoning any limitation upon the extra-lateral right was imposed upon the locators' title by reason of the divergence of end lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations theretofore made
147 the right to pursue the vein on it- downward course, between the end-line plane of such location as it existed."

This proposition is based upon the language of the first proviso in section 3 of the law of 1872. After stating that the locators shall have certain lodes throughout their entire depth, although they may

so far depart from a perpendicular in their downward course as to extend outside the vertical side lines, it proceeds: "Provided that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." Then follows another proviso, that no locator by reason of his right to the dip of his lode shall be authorized to enter upon the surface of a claim owned by another.

These provisos grant no rights additional to those already given, nor do they purport to do so. They are both express limitations upon rights already given. The proviso does not confer ownership to all within those planes, but says, in effect, that no locator may pass beyond them. No rule of construction with which I am familiar would authorize or require a different reading of the section, especially in the face of the evident policy to strictly limit the rights of all locators as to length along the vein or lode.

We have many graphic accounts of the rush of gold-hunters to California in 1849. The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which any one could secure to himself any portion of the rich placers. In the absence of regulation, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily.

First, so far as possible, each person was given a specified portion of the ground which he could mine.

Secondly, the allotment to each was so limited that there should be no monopoly. So far as possible all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims.

And, thirdly, as a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him.

These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific coast, and in all attempts by legislation, territorial, State or national, to regulate mining locations. Indeed, it may be said that the purpose of all these laws and regulations is to secure these ends.

These views are, as I think, expressed by Judge Field in the celebrated Eureka case (4 Saw., 302). The locations there considered were made under the law of 1866, and one of the questions to be decided was whether the defendant was entitled to its allotted distance along the vein, although in its strike the vein passed beyond its exterior surface lines. There was no contention based upon diverging end lines, and there could not have been; for the ore body in dispute was within planes passing through the end lines of the

Champion location, which belonged to plaintiff, and was not within such planes passing through the end lines of any location under which defendant claimed. Defendant, on this point, simply contended that it had the oldest location, and under the law of 1866 had a right to the number of feet on the lode called for in its location, although it extended within the junior locations owned by plaintiff. It was held that defendant could not follow the lode on its strike through any line of its surface location. In reaching this conclusion the court emphasized the invariable and inexorable policy to limit the location along the course of the vein to the quantity located, and to the line of the surface location, and to permit an extension of right only on the dip.

Bearing, then, in mind that the argument was to show that under the law of 1866 the locator could not, for the purpose of securing his length of lode, pass the lines of his surface location, we may be instructed by the decision. It is first said the locations under the law of 1866 are not invalid because the end lines are not parallel. The law did not require such parallelism, and the requirement in the law of 1872 was merely directory and no consequence attached to a deviation from the direction. "Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations as the length of the lode."

The locator was limited to his number of feet on the lode throughout its entire depth, and the court realized that the only possible mode of so limiting the right was by parallel end lines. The miners seem to have regarded a lode as something like a plank. All a locator had to do was to measure off his distance upon it, and then make a "square cut" at the end. Judge Field's idea that the planes of the end "cuts" must be parallel in order to limit the locator at all depths to his number of feet claimed upon the surface is further shown. He says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

"Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been

adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the State were today to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant.

"The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein with its dips, angles and variations, to any depth, although it may enter land adjoining—that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended
148 solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or strike, as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he cannot pass."

Judge Field here was endeavoring to show that the locator was limited under the law of 1866 to the specified number of linear feet on the lode throughout its entire depth. The extent of his right could be measured by the feet on the surface. The statement that the requirement in the law of 1872, that the end lines shall be parallel was only directory, was overruled in Iron Silver M. Co. *vs.* Elgin Mining & Smelting Co., 118 U. S., 196, but that the limitation upon the line or distance on the lode continues throughout its entire depth has always been recognized. And, indeed, it seems obvious that the opposite contention could not be thought of. A proposed rule may be tested by inquiring what may be done with it. Suppose the divergence here had been one hundred and fifty degrees instead of fifteen, the dip being at a small angle from the plane of the horizon. The statutory limitation upon the length which could be taken on the lode would be a farce, even were the ledge the ideal ledge of miners. The Pioneer would soon have extended itself to the entire length of the lode.

I think the law of 1872, instead of extending the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2

provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location."

These words themselves, in my opinion, are sufficient to support the declaration of the court in the Eureka case. Speaking of the limitations provided in section 3 of the act of 1872, which I have noticed, of lodes to planes through the end lines, "The act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines."

This proposition is substantially reiterated in Iron Silver Mine *vs.* Elgin, 118 U. S., 194, and in many other cases, including the latest to which our attention has been called—Walrath *vs.* Champion, 171 U. S., 293.

It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode fifteen hundred and eighty-nine and $\frac{24}{100}$ linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth. * * * Provided that the right of possession to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added as a condition, "that the grant hereby made is restricted to the land hereinbefore described as lot No. forty-eight (48), with fifteen hundred and eighty-nine and $\frac{24}{100}$ linear feet of the Pioneer quartz vein, lode, ledge or deposit throughout its entire depth," etc.

I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion, that a patent to a location with end lines diverging in the direction of the strike does not convey all within those planes, but at the most not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extra-lateral rights at all. Such would be the law if the location were under the law of 1872, and as the patent to the Pioneer was issued after that law took effect counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extra-lateral rights. Another objection is that there is no description of the segment of the lode which extends beyond the surface location, and no grant can be effectual which does not define the thing granted.

Parallel end lines were not required in locations by the law of

1866, and yet extra-lateral rights were specifically given. The act refers to rules and regulations made by miners, but it is not said that any such rule required parallel end lines. It is claimed in argument that such was, in general, the custom of miners, but it is not even contended that there was such a custom in Amador county, and all the patents shown in this case lack such parallelism.

I think it would have been competent for Congress in the law of 1872 to have required parties who had equitable rights to patents to cause such adjustments of their surface lines as would indicate and define their extra-lateral rights—in other words, to have made their end lines parallel before a patent would issue, on pain of losing all extra-lateral rights. There are no such provisions in the act of 1872, but the rights of locators under former laws are expressly confirmed to them.

The presumption is very strong against forfeiture, and against such construction of any law as would work a forfeiture. The language of an act to have such effect must be very plain, or the court will, if possible, give a construction to it that would not have that effect.

It is admitted that such extra-lateral rights are recognized and asserted in the Eureka case, and I think in the language used by Judge Field in Iron S. & M. Co. *vs.* Elgin, 118 U. S., 196. The "Horse Shoe case" is equally clear upon this matter. "Under the act of 1866 (14 Statutes at Large, p. 251), parallelism in end lines of a surface location was not required, but where a location has been made since the act of 1872 such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines." This very clearly implies that a locator under the act of 1866 has such right, although his end lines are not parallel. In many other cases the same thing is implied. (Del Monte *vs.* Last Chance Co., 171 U. S., 55; Walrath *vs.* Champion, 63 Fed. Rep., 552; same case, 171 U. S., 293.)

We come, then, to the other phase of the question: Can it be determined as matter of law, from the patent or the complaint, what segment of the dip, if any, the plaintiff acquired by his location or patent? It is admitted, or rather contended, by counsel on both sides that the court cannot construct end lines. If the court is to adjudge that plaintiff is entitled to follow the dip beyond his lines, it must find some mode of limiting the right along the vein, and that limitation must result as matter of law from the patent, when the necessary facts are shown as to the property it attempts to convey—that is, as to the course and dip of the lode.

The contention of the parties in regard to this matter is shown upon the diagram. Of course it is understood that plaintiff contends for all included between planes drawn through its end
149 lines, although they diverge and would inevitably extend his rights along the strike. While defendant contends that because of such divergence plaintiff has no extra-lateral rights. But each party has an alternative theory, in case its primary contention is not sustained. Plaintiff says, if planes through its end lines do

not control, then planes are indicated between lines perpendicular to the general course of the lode.

Defendant's alternative is that, as the southern end line constitutes the initial line in the survey, it necessarily follows from the requirement of parallel end planes that the northern end line shall be parallel to it. That by locating and fixing the southern end line first the northern end line was thereby also definitely and finally located. These theories are shown in the diagram: 3–5 is the southern end line continued; 1–6 is a parallel line from the northern end of the lode. This shows defendant's theory. These lines would give the ore in dispute to defendant.

The lines suggested by plaintiff are 1–2 and 3–4. These are at right angles to the general course of the lode, and planes descending through them would give the ore to plaintiff. The line B–B′ is the northern end line continued, and between that line and 3–5 is plaintiff's first contention, which we have considered.

I am not referred to any authorities which support the contention of appellant that the southern end line must be considered as the basis from which the surface form of the location was projected. As stated, the argument is that having been first located it followed, as matter of law, that the other end line must be in the same direction in order that end lines may parallel. But the location was made, surveyed, the land paid for, and application made for the patent before the law of 1872 was enacted. The act of 1866 did not require parallel end lines to insure extra-lateral rights, or at all. There was, therefore, no implication that the second end line should be parallel to that first established. It was not an absolute necessity that by a naked description one end line should be described before the other. A side having been located, one sentence could have created both end lines from each end and at right angles to the side line in a certain direction. No such general rule, therefore, applicable to all cases could be adopted. Planes so constructed could not result as matter of law.

Planes through the lode at the end lines of the location at right angles to the general course would impose the required limitation upon the rights of the locator along the lode. The rule that they must be so constructed would be universally applicable—at least theoretically. The congressional system for the sale of mineral lands is founded upon the proposition that the course of the lode can be traced. That nature, in her infinite variety, does not always so deposit her mineral gifts is unfortunate; but I think in construing the law we may have regard to the views of the law-makers in regard to this subject, however crude and inadequate such views were. The law of 1866 is said to have been but a crystal-ization of the rules and customs of the miners. The first lodes worked were, I think, nearly in a uniform direction. The individual claims were short, usually two hundred feet. Under such circumstances it was not difficult to appropriate to each his number of feet on the dip at any depth. In California mines such claims were very often consolidated and disputes avoided. Often, as on the Comstock lode, the miners agreed upon a base line from which the surface form of lo-

cations were projected, or to which they were adjusted. This would result in parallel end lines.

The general practice, I think, was to have their claims bounded, so far as the lode was concerned, by parallel end lines, whatever might be the form of their surface location. In fact, they adopted the idea put forth by Judge Field in the Eureka case. Their rights on the lode were limited to planes at the limit of their right to the lode on the surface, at right angles to the general course of the lode.

The Eureka case is perhaps the only express authority for this proposition, but I do not find, as claimed by the learned counsel for the appellant, that it has been repudiated by later cases. On the contrary, these cases which imply extra-lateral rights when the end lines are not parallel seem to concede this rule. I am unable to understand Walrath *vs.* Champion, 171 U. S., 293, upon any other theory. There was liberty of surface form under the act of 1866, but the law strictly confined the right on the vein bellow the surface. This accords both with the Eureka case and the Flagstaff case. In the latter case it was said: "But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." But rights on the strike were limited by the surface lines of the location under both laws. Judge Field was familiar with the mining customs and laws. I have no doubt he expressed in the Eureka case what had been and was the universal understanding and practice of miners. The rule there declared seems to me reasonable, and, in fact, the only one that can be applied to such patents issued under locations made before the law of 1872 came into existence. If, as suggested, the officers of the land office usually adjust and make the end lines of locations parallel before issuing the patent, such patents, when issued, will be conclusive evidence that such also was the location.

A case has been cited in which the end lines of the location converge in the direction of the dip. (Carson City, etc., *vs.* North Star, 73 Fed. Rep., 597.) It was held that the locator had extra-lateral rights because the conveyance would give less rather than more on the dip of the vein. This may be all right, as it seems to me, however, not because the patent carries less rather than more than would pass had the end lines been parallel, but because that which is granted is described so that it can be definitely located. Under the force of the restriction contained in section 3 of the law of 1872, the locator could not take beyond planes through his end lines. This confined him within well-defined boundaries to less on the dip below the surface than he had upon the surface. If this was an attempt to construe the act of 1872, the logic might be questioned. That act, as construed, does not grant extra-lateral rights, because the end lines are parallel or converge towards the dip of the vein, but if they are parallel. The location there under consideration was made under the act of 1866, and carries extra-lateral rights because the extent of such rights *are* definitely described. At least such was the fact, and no other reason was required. It was, there-

fore, not necessary in that case to consider the point here under debate.

If this position be correct the complaint does definitely describe the segment of the lode from which the ore was taken.

The judgment is affirmed.

TEMPLE, *J.*

We concur.
McFARLAND, *J.*
GAROUTTE, *J.*
HENSHAW, *J.*
HARRISON, *J.*
BEATTY, *C. J.*

150 *Copy from Judgment-roll.*

Supreme Court, State of California.

Bank Minutes.

WEDNESDAY, *December 19th*, 1900.

* * * * * * *

ARGONAUT MINING COMPANY
vs.
KENNEDY MINING AND MILLING COMPANY. } Sac. 733.

The judgment is affirmed.

TEMPLE, *J.*

We concur.
McFARLAND, *J.*
GAROUTTE, *J.*
HARRISON, *J.*
BEATTY, *C. J.*

151 In the Supreme Court of the State of California.

KENNEDY MINING AND MILLING COMPANY, a Corporation, Defendant and Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY, a Corporation, Plaintiff and Defendant in Error.

Assignment of Errors.

Kennedy Mining and Milling Company, having petitioned the above-named court for an order permitting it to prosecute a writ of error to the honorable the Supreme Court of the United States from the final judgment made and entered in said cause by the supreme court of the State of California, now makes and files with its said petition the following, and specifies the same as its assignment of errors herein, upon which it will rely for a reversal of said judgment upon said writ:

(In each of the instances in which in the following assignments of error mention is made of an "agreed statement" it is hereby intended to designate the agreed statement of facts upon which the judgment herein is based, as set forth in the record.)

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"First. All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;"

which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 1.

152 The ruling of the superior court upon said objection (exception No. 1) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

II.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Second. All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy quartz mine, lot No. 44, and that a diagram of said mine was posted in the U. S. land office at Sacramento, California, on October 15, 1870;"

which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 2.

The ruling of the superior court upon said objection (exception No. 2) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error *upon which plaintiff in error* will rely for a reversal of the decision and judgment herein.

III.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifth. All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things, that on March 15, 1871, the U. S. surveyor general for California instructed William L. McKim, a U. S. deputy

153 mineral surveyor, to make patent survey of said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 3.

The ruling of the superior court upon said objection (exception No. 3) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

IV.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Sixth. All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy quartz mine during April and May, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on October 19, 1871, said surveyor general approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed."

Defendant based its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to wit:

"(*a.*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy quartz mine, lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

154 "(*c.*) All and singular each and every the facts so objected to, relate only to the surface area to be embraced within said Kennedy quartz mine, lot No. 44, and in nowise relate to any extralateral right claimed as attaching to said Kennedy quartz mine, lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 44; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and the Pioneer quartz mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Kennedy quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Kennedy quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to the Silva quartz mine, lot No.

86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

"(*e.*) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII, VIII, IX, and X of said agreed statement, are irrelevant and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva quartz mine, and without the vertical end boundaries of said Kennedy quartz mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva quartz mine, lot No. 86, which ownership is shown by the facts set forth in paragraph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva quartz mine was issued, to wit, under chapter six of title thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance embraced within the area of said Silva quartz mine as described in said Silva patent; and

"(*f.*) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy quartz mine, lot No. 44."

155 Said 6th objection excepting in so far as the same relates to paragraphs seven (7) and eight (8) of said agreed statement, was overruled by the court; to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 4.

The ruling of the superior court upon said objection (exception No. 4) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

V.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Seventh. All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on July 29, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for said Kennedy quartz mine, lot No. 44, said patent being set forth *in hæc verba* in said paragraph XI;"

which said objection was overruled by the court; to which ruling

the defendant did duly except, and made the same of record as the defendant's exception No. 5.

The ruling of the superior court upon said objection (exception No. 5) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

156 VI.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eighth. All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such facts show or tend to show that on December 28, 1886, said Kennedy Mining Company conveyed to this defendant all the property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872."

Defendant based its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

"(*a.*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine, nor by showing the limitations of the patent to said Kennedy quartz mine; but plaintiff must rely upon and clearly show its own title to said ores; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva quartz mine, lot No. 86, and not by reason of its ownership of said Kennedy quartz mine, lot No. 44."

Said eighth objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 6.

The ruling of the superior court upon said objection (exception No. 6) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

157 VII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Ninth. All and singular each and every the facts set forth in

paragraph XVII of said agreed statement, and the facts shown by the plat designated as 'Exhibit A' in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy quartz mine, lot No. 44;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 7.

The ruling of the superior court upon said objection (exception No. 7) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

VIII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Tenth. All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such facts show or tend to show the southern end line of said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the southern end line of said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 8.

The ruling of the superior court upon said objection (exception No. 8) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

158 IX.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Eleventh. All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy quartz mine, lot No. 44, and the nature and extent of said vein within said Kennedy quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 9.

The ruling of the superior court upon said objection (exception No. 9) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

X.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twelfth. All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in said Kennedy quartz mine, lot No. 44, and that said vein crosses out of said Kennedy quartz mine into said Pioneer quartz mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 10.

The ruling of the superior court upon said objection (exception No. 10) and the affirmance of such ruling by the supreme
159 court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XI.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Thirteenth. All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy quartz mine or the identity of such vein or any vein in said Kennedy mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B′ but within the vertical boundaries of said Silva quartz mine, lot No. 86;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 11.

The ruling of the superior court upon said objection (exception No. 11) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fourteenth. All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy quartz mine on December 28, 1886, and ever*y* since has been and now is such owner.

"And defendant based its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs

XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to wit:

160 "(*a.*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy quartz mine, lot No. 44; and

"(*c.*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer quartz mine, lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy quartz mine; and

"(*d.*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva quartz mine, lot No. 86, and not by reason of its ownership of Kennedy quartz mine, lot No. 44."

Said 14th objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 12.

The ruling of the superior court upon said objection (exception No. 12) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XIII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifteenth. All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer quartz mine, lot No. 48, and that a diagram of said Pioneer quartz mine was posted in the U. S. land office at Sacramento, California, and on said Pioneer mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 13.

161 The ruling of the superior court upon said objection (exception No. 13) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XIV.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein of—

"Eighteenth. All and singular each and every the facts set forth

in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. surveyor general for California instructed said William L. McKim to make patent survey of said Pioneer quartz mine;"

which said objection was overruled by the court; to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 16 (14)[2].

The ruling of the superior court upon said objection (exception No. 16 (14)[2] and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XV.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Nineteenth. All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent survey of said Pioneer quartz mine on September 1, 1871, and thereupon returned said survey to the U. S. surveyor general's office, and that on December 21, 1871, said surveyor general approved said survey, the aforesaid return of such survey of said Pioneer quartz mine being set forth *in hæc verba* in said paragraph XIV of said agreed statement;"

162 which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 15.

The ruling of the superior court upon said objection (exception No. 15) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XVI.

At said trial the defendant specifically set forth, made and claimed its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twentieth. All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer quartz mine as so surveyed by said William L. McKim, and that the receiver of said U. S. land office thereupon issued his duplicate receipt evidencing such entry and payment."

Defendant based its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to are

immaterial and irrelevant to all and singular each and every the issues in this cause; and

"(*b.*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer quartz mine, lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and

163 "(*c.*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Pioneer quartz mine, lot No. 48, and in nowise relate to any extra-lateral right claimed as attaching to said Pioneer quartz mine, lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said lot No. 48; and

"(*d.*) The agreement as to the common boundary line between said Kennedy quartz mine and said Pioneer quartz mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer quartz mine, nor was said agreement ever recorded in the office of the county recorder of the county of Amador, State of California, in which said Pioneer quartz mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy quartz mine, lot No. 44, or at the time when it acquired its title to said Silva quartz mine, lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement."

Said twentieth objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 16.

The ruling of the superior court upon said objection (exception No. 16) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XVII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pio-

164 neer Gold and Silver Mining Company the Pioneer quartz mine, lot No. 48, as the same is described in said letters patent, a copy of which is set forth *in hæc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 17.

The ruling of the superior court upon said objection (exception No. 17) and the affirmance of such ruling by the supreme court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XVIII.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed statement, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof."

Defendant based its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer quartz mine, lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or
165 right in plaintiff to the ores in dispute in this cause, because:

Although it is true that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the 'Pioneer vein,' and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said

Pioneer patent and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said lot No. 48 and from said vertical east side line thereof and
166 so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48 should or could attach to said lot No. 48 and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

"(*b.*) All the ores in dispute in this cause were extracted by de-

fendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer quartz mine, lot No. 48, and defendant specially sets up and claims that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to
167 follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48—therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States' under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer quartz mine, lot No. 48, as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

"(*c.*) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(*d.*) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only 1,589.94 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1,589.94 linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1,589.94 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer quartz mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1,589.94 linear feet of said Pioneer vein mid-

way between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that, even though the grant of 1,589.94 linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

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"(*e*.) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent, and by the complaint herein, said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the centre of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48, which is definable by reference to the boundaries of said lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent."

Said 22nd objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 18.

The ruling of the superior court upon said objection (exception No. 18) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XIX.

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At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1,450, 1,550, 1,650 and 1,750 levels south of a vertical plane drawn down through the north end line of said lot No. 48 extended indefinitely in its own direction north seventy-four (74) degrees and fifty-one (51) minutes east, and that between October 8, 1895, and December 12, 1895,

this defendant extracted 2,604 tons of ore from said Pioneer vein southerly from said vertical plane but within the vertical boundaries of said Silva quartz mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;"

which said objection was overruled by the court, to which the defendant did duly except, and made the same of record as the defendant's exception No. (19).

The ruling of the superior court upon said objection (exception No. 19[a]) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XX.

At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'."

170 Defendant based its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(a.) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: Although it is true that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said lot No. 48 throughout the entire length of said lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said lot No. 48 indefinitely extended in their own directions respectively,—it is also true that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to 'Exhibit A' referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1,300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said lot No. 48, to wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said lot No. 48, and it is also true that, as shown by said Pioneer patent

and by the complaint herein and by reference to said 'Exhibit A,' the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, and it is also true that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer quartz mine easterly through and beyond the vertical east side line thereof
171 into ground lying easterly from said lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, and it is also true that, as shown by reference to said paragraph XXIII and to said 'Exhibit A' all of said ores were extracted outside of and far easterly from said lot No. 48 and at points where vertical planes drawn down through the end lines of said lot No. 48 extended in their own directions respectively, are distant from each other more than 1,900 feet, and it is also true that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' and more than three months after said act of Congress became a law, and it is also true that, under the provisions of said act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer quartz mine, lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said lot No. 48, should or could attach to said Pioneer quartz mine, and be enjoyed by the owners thereof; and therefore and because the end lines of said Pioneer quartz mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer quartz mine, lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said lot No. 48, and therefore the act of the officers of

the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and therefore said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, and therefore did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer quartz mine to said plaintiff; and

172 "(*b.*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said lot No. 48 and within the vertical boundaries of defendant's Silva quartz mine, lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and defendant specially sets up and claims that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said lot No. 86, and defendant further under said statutes and legislation of the United States specially sets up and claims immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof and defendant further specially sets up and claims immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48. Therefore and because of the provisions of the act of the Congress of the United States, approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under which the U. S. patent to said lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86, or any thereof; and

173 "(c.) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48; and

"(d.) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1,589.94 linear feet of said Pioneer vein with the exclusive right to said 1,589.94 linear feet of said vein throughout its entire depth, although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1,589.94 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1,589.94 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint whether it is the intention of plaintiff to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1,589.94 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1,589.94 linear feet of said Pioneer vein midway between said end lines of said Pioneer quartz mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

"(e.) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said lot No. 48, such part so defined must be either (1) that certain segment of 1,589.94 linear feet of said vein lying parallel to and next northerly from the south end line of said lot No. 48 extended in its own course easterly, because, as is shown by said complaint,
174 said south end line of said lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for its north boundary, a line drawn from the center of the north end line of said lot No. 48, to wit, from the north end of said vein, parallel to the south end line of said lot No. 48 extended in its own course north eighty-nine (89) degrees and thirty-six (36) minutes east, and for its south boundary, a line drawn from the center of the south end line of said lot No. 48, to wit, from the south end of said vein, parallel to the north end line of said lot No. 48 extended in its own course north seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said lot No. 48 which is de-

finable by reference to the boundaries of said lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint."

Said 24th objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 20.

The ruling of the superior court upon said objection (exception No. 22) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXI.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 1, as follows:

"That the plaintiff, Argonaut Mining Company, is and at
175 all times mentioned in the complaint was the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine;"

and made such exception of record herein as defendant's exception No. 21.

The ruling of the superior court upon said matter (exception No. 21) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXII.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 2, as follows:

"That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and the said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful;"

and made such exception of record herein as defendant's exception No. 22.

The ruling of the superior court upon said matter (exception No. 22) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error

upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

176 XXIII.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 3, as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold, together with interest thereon from September 14th, 1898 at the rate of seven per cent. per annum, also costs of suit;"

and made such exception of record herein as defendant's exception No. 23.

The ruling of the superior court upon said matter (exception No. 23) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXIV.

The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of this court as follows:

"(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its own direction eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to be run or extended thereon any drifts, levels, stopes or mining works of any kind;"

and made such exception of record herein as defendant's exception No. 24.

The ruling of the superior court upon said matter (exception No. 24) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

177 XXV.

Defendant also excepted to that part of the judgment rendered herein, as follows:

"It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-

eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit taxed at $260;"

and made such exception of record as defendant's exception No. 25.

The ruling of the superior court upon said matter (exception No. 25) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

XXVI.

Defendant also excepted to that part of the judgment herein as follows:

"It is further ordered, adjudged and decreed that the defendant Kennedy Mining and Milling Company, its agents, servants, attorneys, and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly,

178 and from extracting or removing from any portion of said vein so lying between said vertical planes, any ore, rock or other material, and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit: The north end line, being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof;"

and made such exception of record herein as defendant's exception No. 27.

The ruling of the superior court upon said matter (exception No. 26) and the affirmance of such ruling by the supreme court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

That the superior court of the county of Calaveras, State of California, at the trial of said cause erred in each and every of its rulings and decisions upon each and every of the matters in these assignments of error respectively set forth, and the supreme court of the State of California, in its decision of the appeal of this plaintiff in error by affirming the said judgment and decision of said superior court, erred in so affirming the said rulings, decision, and judgment of said superior court in each and every of the particulars herein in this assignment of errors enumerated from 1 to 26, inclusive, thereof.

179 Wherefore, by reason of the foregoing assignment of errors and the petition of defendant, plaintiff in error herein, for leave to prosecute a writ of error herein to the Supreme Court of the United States, the plaintiff in error submits its said petition and these assignments of error and prays for an order of this honorable court; and said plaintiff in error further prays that upon the hearing of this cause by the said Supreme Court of the United States upon such writ of error all of the said judgment rendered herein by the superior court of the county of Calaveras, State of California, and the judgment of the said supreme court of the State of California affirming the same, may be by said Supreme Court of the United States reversed and set aside, and that upon said hearing of such writ of error such other and further order may be made in the premises as may be just.

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Plaintiff in Error.

180 [Endorsed:] Sac. 733. In the supreme court of the State of California. Kennedy Mining and Milling Company, a corporation, plaintiff in error, *vs.* Argonaut Mining Company, a corporation, defendant in error. Assignment of error. Filed January 14th, 1901. Geo. W. Root, clerk, by W. E. Boody, deputy.

181 In the Supreme Court of the State of California.

ARGONAUT MINING COMPANY, a Corporation, Defendant in Error,
vs.
KENNEDY MINING & MILLING COMPANY, a Corporation, Plaintiff in Error.

Petition for Allowance of Writ of Error.

To the honorable chief justice of the supreme court of the State of California:

Kennedy Mining and Milling Company, a corporation and plaintiff in error herein, most respectfully represents to your honor that it is the defendant and plaintiff in error in the proceeding and action hereinafter mentioned, and that Argonaut Mining Company, a corporation, is the plaintiff and defendant in error in said cause.

That said action was originally brought by complaint filed in the superior court of the State of California in and for the county of Amador on August 5th, 1897.

That on the 14th day of February, 1898, the defendant filed its answer therein.

That on April 13th, 1898, the attorneys for parties plaintiff and defendant to said action filed a written stipulation in said cause, by the terms of which it was agreed that because of the disqualification of the judge of the superior court of Amador county, State of California, an order might be made in said cause transferring the same

for trial to the superior court of Calaveras county, State of California.

That on the 13th day of April, 1898, an order was duly made and entered by the said superior court of the county of Amador reciting the disqualification of the judge of said court to try said cause and ordering that said cause be transferred to the superior court
182 of Calaveras county, State of California, for trial.

That thereafter and prior to September 14th, 1898, all of the record in said cause and said order transferring the same as aforesaid were duly certified to and filed in the office of the clerk of the superior court of the county of Calaveras, State of California.

That on the 14th day of September, 1898, said cause came on regularly for trial on the issues raised by said complaint and answer before the court, without a jury; and thereupon was made and entered into by the respective parties plaintiff and defendant to said suit an agreed statement of facts and stipulation submitting cause, by the terms of which all of the facts embraced within the issues made by the said complaint and answer in said cause were agreed upon, determined, and established for all of the purposes of the decision of said cause.

That by the terms of such agreed statement of facts it was expressly provided and reserved on the part of each, plaintiff and defendant, in said cause to the effect that the admission of such facts respectively as evidence in this cause shall be deemed and taken as duly objected to by the respective parties for want of relevancy and materiality to and competency to prove the issues presented by the pleadings, as fully for all purposes as though such objections were separately made and noted on the record in the customary legal manner.

183 And it is further stipulated and agreed that the admission of each of such facts as evidence and such objections thereto shall be ruled upon by the court at the time of the court's decision of the cause after final argument and submission.

Each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the court the same as though made in open court or as though specifically set forth in this stipulation.

And it is further stipulated and agreed that each of such rulings by the court upon the admission of such facts as evidence and upon such objections thereto, shall be deemed and taken as duly excepted to by the party against which such ruling shall be made, as fully for all purposes as though such exceptions were separately taken and noted on the record in the customary legal manner.

That upon and in pursuance of the right so to interpose such objections at said trial the defendant, on the 11th day of October, 1898,

and within the time stipulated by counsel for such purpose, served upon counsel for plaintiff defendant's objections to the admission or consideration by the court as evidence or as possessing probative force in said cause of certain of the facts specified in said agreed statement, and such objections in writing were filed of record in said cause on the 12th day of October, 1898.

That thereafter, but before rendering its decision upon said trial, the said superior court of the said county of Calaveras made its rulings upon all and each of such objections.

184 And on March 29th, 1899, the said superior court of the county of Calaveras rendered and entered its decision in said cause by adopting said agreed statement of facts as its finding of fact therein, together with its conclusions of law in writing appended thereto.

That said conclusions of law were to the following effect:

As to conclusions of law from said agreed statement of facts, the court find:

I.

That the plaintiff, Argonaut Mining Company, is and at all times mentioned in the complaint was, the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine lot number 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had, and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, within said vertical planes, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine.

II.

That the entry by said defendant upon said vein southerly beyond the vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine, and said end line produced eastwardly and the extraction of ore therefrom as set forth in said agreed statement of facts, was wrongful and unlawful.

III.

That the plaintiff is entitled to judgment and decree of this court as follows:

(1.) That plaintiff have and recover of and from the defendant, Kennedy Mining and Milling Company, the sum of fifty-six thousand and ninety-nine $\frac{95}{100}$ (56,099.95) dollars in gold, together

185 with interest thereon from September 14th, 1898, at the rate of seven per cent. per annum, also costs of suit.

(2.) That defendant be perpetually restrained and enjoined from entering in or upon any portion of said vein which lies southerly beyond a vertical plane drawn through the northerly end line of said Pioneer or Argonaut mine and said end line extended in its

own direction eastwardly, and from extracting or removing from any portion of said vein so lying southerly beyond said vertical plane, any ore, rock or other material, and from running or causing to be run or extended thereon any drifts, levels, stopes or mining works of any kind.

Let judgment be entered accordingly.

Dated March 27th, 1899.

That on the 29th day of March, 1899, the said superior court of Calaveras county, State of California, rendered and entered its judgment in said cause as follows, to wit:

This cause came on regularly for trial on September 14th, 1898. Messrs. Lindley & Eickhoff, W. J. McGee and F. J. Solinsky appeared for plaintiff, and Messrs. John M. Wright, Byron Waters, and John J. Snyder appeared for the defendant.

Thereupon said cause was submitted to the court for its decision upon an agreed statement of facts in writing pursuant to a stipulation in writing signed in that behalf by counsel for the respective parties.

And the court, having made its decision and conclusions of law in writing, which are now on file in this cause, wherein judgment and decree was awarded in favor of plaintiff against the defendant:

It is now therefore hereby ordered, adjudged and decreed that plaintiff do have and recover of and from defendant the sum of fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ ($58,237.85) dollars, together with costs of suit taxed at $260.00.

It is further ordered, adjudged and decreed that the defendant, Kennedy Mining and Milling Company, its agents, servants,
186 attorneys and employees, be, and they are hereby perpetually restrained from entering in or upon any portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the end lines of said Pioneer or Argonaut mine, lot No. 48, and said end lines produced in their own directions indefinitely eastwardly, and from extracting or removing from any portion of said vein so lying between said vertical planes, any ore, rock or other material, and from running or causing to be run or extended on said vein any drifts, levels, stopes or mining works of any kind between said vertical planes, said end lines being those two certain lines described respectively as follows, to wit, the north end line being that certain boundary of said lot number 48 beginning at the northwest corner of said lot and running north seventy-four (74) degrees fifty-one (51) minutes east along the northerly end thereof, and the south end line being that certain boundary of said lot beginning at the southwest corner thereof and running north eighty-nine (89) degrees thirty-six (36) minutes east along the southerly end thereof.

Dated this 27th day of March, 1899.

G. W. NICOL,
Judge Presiding.

That upon the 3rd day of July, 1899, defendant, Kennedy Mining and Milling Company, caused to be served upon plaintiff, Argonaut

Mining Company, said defendant's bill of exceptions in said cause, in which are set out all and each of the exceptions reversed by the said defendant at the trial of said cause, together with exceptions reserved and taken to the conclusions of law as well as to the decision and judgment of the court rendered therein.

That such bill of exceptions was by the judge of said superior court duly settled and allowed and authenticated and filed in said cause on July 22nd, 1899.

That on the 17th day of May, 1899, defendant, Kennedy Mining and Milling Company, caused its notice of appeal in due form to be served upon the attorneys for plaintiff, Argonaut Mining Company, and to be duly filed in the office of the clerk of said superior court, by the terms of which notice was given that said defendant appealed to the supreme court of the State of California from the judgment in said cause rendered and entered therein by the said superior
187 court of the county of Calaveras.

That such appeal was perfected and the record thereof was duly filed in the office of the clerk of this court on the 28th day of August, 1899.

That on the perfecting of said appeal said defendant, Kennedy Mining and Milling Company, executed in due form and caused to be properly filed its undertaking on appeal in the sum of $300 conditioned for the payment of costs and damages that might be awarded to said plaintiff upon such appeal or dismissed thereof; and said defendant also, in order to procure a stay of execution pending such appeal, caused to be executed in due form and properly filed in the office of the clerk of the said superior court of said Calaveras county in said cause an undertaking on its behalf staying the execution of said judgment appealed from, in pursuance of the laws of the State of California in that behalf provided, which said undertaking staying execution was and is in the penal sum of $119,000.00 and in double the amount of said judgment, a copy of which said undertaking staying execution, duly certified by the custodian thereof, to wit, the clerk of the superior court of the county of Calaveras, is hereto appended, marked "Exhibit A," and made a part of this petition.

That said undertaking remains in full force and virtue, and by the terms and conditions thereof the said Argonaut Mining Company has secured unto it the full fruits of its said judgment in case the same or any part thereof shall be finally affirmed.

That the appeal of said defendant, Kennedy Mining and Milling Company, in said cause came on for hearing before this court at its May session, held at Sacramento, California, on May 8th, 1900.

188 That on December 19th, 1900, this the supreme court of the State of California rendered its decision of and upon said appeal, by the terms of which decision all of the said judgment of the said superior court was affirmed.

In said action and proceeding there was involved and drawn in dispute and question at the trial of said cause in said superior court of the county of Calaveras, State of California, as well as upon said

appeal so taken and heard in the supreme court of the State of California, the determination and decision of the title, right, privilege, and immunity claimed by this defendant under the statutes and laws of the United States—that is, under the provisions of chapter VI of title 32 of the Revised Statutes of the United States and legislation supplemental thereto and the act of Congress of the United States approved May 10th, 1872, entitled "An act to promote the development of the mining resources of the United States and acts amendatory thereof and supplemental thereto," and under the mining laws of the United States; which said titles, rights, privileges, and immunities so claimed by said defendant under said acts of Congress and under the mining laws of the United States were by said defendant, at the trial of the said cause in said superior court of the county of Calaveras and upon its said appeal before the said supreme court of the State of California, specially set up and claimed under the aforesaid statutes and legislation of the United States to the effect that this defendant at all the times mentioned in said complaint and answer has had and now has against all the world the exclusive title and right to all and singular each and every the 2,604 tons of ore in dispute in said cause and to all and singular each and every the substance contained within the vertical boundaries of defendant's Silva mine, lot No. 86, described in said agreed statement of facts, and that said defendant, under said statutes and legislation of the United States at each of said times in each
189 of said courts, specially set up and claimed immunity from all and every claim of said plaintiff to said 2,604 tons of ore and all thereof and from all and any claims of said plaintiff to the substance contained within the vertical boundaries of said lot No. 86 or any thereof.

And said defendant further specially set up and claimed at the trial of said cause and upon its appeal immunity from and against the claim of plaintiff to said 2,604 tons of ore and the substance contained within the vertical boundaries of said lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer quartz mine, lot No. 48, were not and are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen degrees and forty-five minutes, so that in order to reach said points where said ores were extracted, to wit, within the vertical boundaries of said lot No. 86, it is and was necessary to follow said Pioneer vein on its dip away from said lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said lot No. 48, and into the area of defendant's mining ground embraced in said lot No. 86.

Therefore and because of the provisions of the act of Congress of the United States approved May 10th, 1872, entitled "An act to promote the development of the mining resources of the United States," under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said act, the owners of said Pioneer quartz mine, lot No. 48, are not now

and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said lot No. 86 or any thereof.

That the decision and judgment of the said superior court of the county of Calaveras, State of California, and as well the decision and judgment of the supreme court of the State of California, upon said appeal in said cause, were each and both decisions against the said title, right, privilege, and immunity so existing and specially set up and claimed by defendant, Kennedy Mining and Milling Company, under such laws of the United States hereinbefore specified, and the defendant and appellant in said action, Kennedy Mining and Milling Company, plaintiff in error herein, being dissatisfied with the judgment made and entered in said action and with the affirmance of the said judgment by said honorable court, and feeling itself aggrieved thereby and by the action of said court in awarding a judgment in favor of Argonaut Mining Company, plaintiff as aforesaid, and against plaintiff in error herein, and plaintiff in error claiming that under the agreed statement of facts herein judgment should have been in favor of defendant, the plaintiff in error, and that such judgment is contrary both to the law and the agreed facts, and that judgment in said cause should have been that plaintiff and defendant in error take nothing by its said action, and that defendant therein and plaintiff in error herein should have recovered judgment for its costs herein incurred.

For the proof of all of which statements herein made and for further particulars as to the questions and matters involved in said cause, reference is hereby made to the record of said cause on file in the office of the clerk of the supreme court of the State of California, and to the said certified copy of said undertaking on appeal staying execution, which is hereto appended and marked "Exhibit A," and all of said record and said certified copy of said undertaking on appeal are hereby made a part hereof.

Comes now aforesaid Kennedy Mining and Milling Company, plaintiff in error, by its attorneys, John M. Wright and Byron Waters, and petitions this honorable court for an order allowing said defendant, plaintiff in error, to prosecute a writ of error herein to the honorable Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided.

And also that an order be made fixing the amount of security which the plaintiff in error herein shall give upon said writ as required by the laws of the United States and by the rules of the Supreme Court of the United States, and in fixing the amount of such security so to be given by plaintiff in error the giving heretofore of the undertaking on appeal staying execution under the laws of the State of California, as hereinbefore specified, be taken into consideration, and that plaintiff in error be allowed the full benefit of said existing bond now in force securing defendant in error in the payment of the full amount of any judgment which may be

awarded to it by the affirmance of said judgment in whole or any part thereof.

And that such other and further order be made relative to said security to defendant in error as may be meet in the premises, to the end that the granting of the said writ of error and the making of said order as to such security and the compliance with the terms of said order by plaintiff in error shall operate as a supersedeas in said action, and that in the giving of such security all further proceedings in the superior court of the State of California in and
192 for the county of Calaveras and in the supreme court of the State of California be suspended and stayed until the determination of said cause upon said writ of error by the Supreme Court of the United States.

And your petitioner, as in duty bound, will ever pray, etc.

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Defendant and Plaintiff in Error.

Writ of error allowed January 14th, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

193 (EXHIBIT "A.")

$1.49½, U. S. I. R. S., cancelled.

In the Superior — of the County of Calaveras, State of California.

ARGONAUT MINING COMPANY, Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY, Defendant. } # 1408.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the State of California from a final judgment *and* entered in and by said superior court on the 29th day of March, 1899, against the defendant in said action and in favor of the plaintiff in said action for the sum of fifty-eight thousand two hundred thirty-seven $\frac{85}{100}$ (58,237.85) dollars and two hundred and sixty (260) dollars, costs of suit (said judgment also awarding to plaintiff a perpetual injunction against defendant, restraining defendant from mining any ore from within certain boundaries of the vein described in said judgment as the Pioneer or Argonaut vein):

Now, therefore, and in consideration of the premises and of such appeal, The United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, does hereby undertake and promise on the part of the appellant, to wit, the said Kennedy Mining and Milling Company, that the said appellant will pay all damages and costs which may be awarded against said Kennedy Mining and Milling Company, appellant, on

the appeal or on a dismissal thereof, not exceeding three hun-
194 dred (300) dollars, to which amount the said The United States Fidelity and Guaranty Company aforesaid acknowledges itself firmly bound;

And whereas the appellant, Kennedy Mining and Milling Company, is desirous of staying the execution of the said judgment so appealed from, the said The United States Fidelity and Guaranty Company does further, in consideration thereof and of the premises, acknowledge itself bound on the part of said appellant in the further sum of one hundred and nineteen thousand (119,000) dollars, being double the amount named in the said judgment, and does undertake, covenant, and promise on the part of said appellant that if said judgment appealed from or any part thereof be affirmed or the appeal be dismissed the appellant, Kennedy Mining and Milling Company, will pay to said Argonaut Mining Company the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant, Kennedy Mining and Milling Company, does not make such payment within thirty (30) days after the filing of the remittitur from the supreme court in the court from which the appeal is taken judgment may be entered, on motion of the respondent, in favor of said respondent, Argonaut Mining Company, and against said The United States Fidelity and Guaranty Company for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

Dated this twentieth day of May, 1899.

[Corporate Seal.]

THE UNITED STATES FIDELITY [SEAL.]
AND GUARANTY COMPANY,
By J. D. MAXWELL, *Its Attorney-in-fact.* [SEAL.]

195 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this twentieth day of May, A. D. one thousand eight hundred and ninety-nine, before me, O. A. Eggers, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared J. D. Maxwell, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of The United States Fidelity and Guaranty Company, and the said J. D. Maxwell acknowledged to me that he subscribed the name of The United States Fidelity & Guaranty Company thereto as principal and his own name as attorney-in-fact.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city and county of San Francisco, the day and year first above written.

[SEAL.] O. A. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed May 22, 1899. J. S. Jack, clerk.

STATE OF CALIFORNIA, } ss:
County of Calaveras, }

I, J. S. Jack, county clerk of the county of Calaveras, State of California, and clerk of the superior court, do hereby certify that I have compared the foregoing copy of the appeal bond of defendant in appealed cause, Argonaut Mining Company, plaintiff, *vs.* Kennedy Mining and Milling Company, defendant, and of the endorsements thereupon, with the original records of the same remaining in this office, and that the same are correct transcripts therefrom and of the whole of said original records.

[SEAL.]

(10-c. Rev. St.)

In witness whereof I have hereunto set my hand and affixed the seal of said court this seventh day of January, 1901.

J. S. JACK,
County Clerk and ex Officio Clerk of said Superior Court of said County.

196 [Endorsed:] Sac., No. 733. In the supreme court of the State of California. Argonaut Mining Company (a cor.), defendant in error, *vs.* Kennedy Mining and Milling Company (a cor.), plaintiff in error. Petition for allowance of writ of error. Filed January 14th, 1901. Geo. W. Root, clerk, by W. E. Moody, deputy.

197 In the Supreme Court of the State of California.

KENNEDY MINING AND MILLING COMPANY, a Corporation, Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY, a Corporation, Defendant in Error.

Order Allowing Writ of Error.

Upon the petition of Kennedy Mining and Milling Company, plaintiff in error, for a writ of error herein and the accompanying assignments of error presented and filed therewith on this 14th day of January, 1901, on motion of John M. Wright and Byron Waters, of counsel for plaintiff in error, said Kennedy Mining and Milling Company—

It is ordered that a writ of error herein be, and is hereby, allowed, and in view of the fact that said Kennedy Mining and Milling Company has heretofore in this cause filed in the office of the clerk of the superior court of the county of Calaveras, California, an undertaking on appeal from the judgment of the said court rendered in this cause in double the amount of the judgment rendered by said superior court herein, securing to said Argonaut Mining Company the fruits of said judgment in case the same be finally affirmed, which said undertaking on appeal yet remains in full force and effect, and in consideration of said undertaking so securing said Argonaut Mining Company, and in view of the fact that thereby defendant in error, said Argonaut Mining Company, is fully protected by ample security for the payment of said judgment in case the same or any

part thereof be affirmed by the Supreme Court of the United States, it is further ordered that in order to stay execution of said
198 judgment pending the writ of error herein, plaintiff in error shall not be required to file any further or additional supersedeas bond, but that said undertaking shall stand as a supersedeas bond herein, and that said plaintiff in error, Kennedy Mining and Milling Company, is only required to give an additional bond for costs and just damages for delay herein, as required by law and the rules of the Supreme Court of the United States, in the penal sum of one thousand ($1,000.00) dollars, which said bond already given and said bond provided for by this order shall operate as a supersedeas bond, staying execution of the said judgment pending the writ of error aforesaid.

January 14th, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

199 [Endorsed:] Sac., 733. In the supreme court of the State of California. Kennedy Mining & Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Order allowing writ of error. Filed January 14th, 1901. Geo. W. Root, clerk, by A. W. Johnson, deputy.

200 In the Supreme Court of the State of California.

KENNEDY MINING AND MILLING COMPANY (a Corporation), Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY (a Corporation), Defendant in Error.

H. S., N. P. Know all men by these presents that we, Kennedy Mining and Milling Company, as principal, and Albert H. Reichling and George Goodman, as sureties, are held and firmly bound unto the People of the State of California in the full and just sum of one thousand (1,000) dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of January, 1901.

Whereas the action above entitled was originally brought in the superior court of the State of California in and for the county of Amador, on August 5th, 1897, and thereafter said cause was transferred for trial to the superior court of the county of Calaveras, in said State; and

Whereas on March 29th, 1899, said superior — of the county of Calaveras rendered and entered its decision in said action, and thereupon caused its final judgment in said action to be rendered and entered awarding to plaintiff, Argonaut Mining Company (defendant in error), a judgment therein against defendant, Kennedy Mining and Milling Company (plaintiff in error), for the sum of
201 fifty-eight thousand two hundred and thirty-seven and $\frac{85}{100}$ dollars ($58,237.85), together with costs of suit, taxed at two

hundred and sixty (260) dollars, but upon which said judgment plaintiff in error duly perfected an appeal to the supreme court of the State of California on the 28th day of August, 1899; and

Whereas, on the perfecting of said appeal, said defendant, Kennedy Mining and Milling Company, executed in due form and caused to be properly filed its undertaking on appeal in the sum of three hundred dollars ($300), conditioned for the payment of costs and damages that might be awarded to said plaintiff upon such appeal or dismissal thereof, and said defendant also, in order to procure a stay of execution pending such appeal, caused to be executed in due form and properly filed, in the office of the clerk of said superior court of said Calaveras county, in said cause an undertaking on its behalf staying the execution of said judgment appealed from, in pursuance of the laws of the State of California in that behalf provided, which said undertaking staying execution was and is in the penal sum of one hundred and nineteen thousand dollars ($119,000) and in double the amount of the said judgment, a copy of which said undertaking staying execution, duly certified by the custodian thereof, to wit, the clerk of the superior court of the county of Calaveras, State of California, is annexed unto the petition for writ of error herein, which said undertaking staying execution remains in full force and virtue, and by the terms and conditions thereof the said Argonaut Mining Company has secured unto it the full fruits of its said judgment in case the same or any part thereof shall be finally affirmed; and

Whereas by such appeal all of the said judgment in the
202 said superior court of the county of Calaveras, State of California, was by the said supreme court of the State of California in all respects affirmed; and

Whereas the petition of Kennedy Mining and Milling Company, plaintiff in error, was, on the 14th day of January, 1901, duly presented to the chief justice of the supreme court of the State of California, praying for the allowance of a writ of error to the *the* Supreme Court of the United States herein, and praying that upon such writ of error the said judgment shall be reversed by the Supreme Court of the United States; and

Whereas said petition has been allowed by the chief justice of the supreme court of the State of California, and an order at the same time of such allowance was made that said undertaking staying execution be allowed to stand as for a supersedeas bond herein, operating as a stay of execution of the said judgment until the final determination of said writ of error by the Supreme Court of the United States, upon plaintiff in error filing herein, duly executed, with proper sureties, its bond to and in favor of defendant in error, Argonaut Mining Company, in the sum of one thousand (1,000) dollars, conditioned as required by law:

Now, the condition of this obligation is such that if the said Kennedy Mining and Milling Company shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make

good its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

KENNEDY MINING AND MILLING COMPANY,
[SEAL.] By DANIEL E. HAYES, *Its President, and*
By E. C. HUTCHINSON, *Its Secretary.*
ALBERT H. REICHLING. [SEAL.]
GEORGE GOODMAN. [SEAL.]

[Five ten-c. rev. stamps.]

203 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

H. S., N. P. Albert H. Reichling and George Goodman, being duly and separately sworn, each for himself, and not one for the other, says:

I am one of the sureties upon the above undertaking and reside in the city and county of San Francisco, State of California, and am a householder therein. I am worth the sum of five thousand (5,000) dollars in property situate in said State of California over and above all my just debts and liabilities, exclusive of property exempt from execution.

ALBERT H. REICHLING.
GEORGE GOODMAN.

Subscribed and sworn to before me this 14th day of January, 1901.

HOLLAND SMITH,
[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

204 [Endorsed:] Sac., 733. In the supreme court of the State of California. Kennedy Mining and Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Bond on writ of error. 5. Filed January 14, 1901. Geo. W. Root, clerk, by W. E. Boody, deputy. The within bond is hereby approved. W. H. Beatty, chief justice of the supreme court of California. January 14, 1901.

205 KENNEDY MINING AND MILLING COMPANY, a Corporation, Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY, a Corporation, Defendant in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Argonaut Mining Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 15th day of March, 1901, pursuant to a writ of error filed in the clerk's office of the supreme

court of the State of California, wherein Kennedy Mining and Milling Company, a corporation, is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 14th day of January, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

206 [Endorsed:] Sac., 733. Kennedy Mining & Milling Company (a corporation), plaintiff in error, *vs.* Argonaut Mining Company (a corporation), defendant in error. Citation. Filed January 15th, 1901. Geo. W. Root, clerk, by W. E. Boody, deputy.

Service of the *written* citation and receipt of a copy of the writ of error mentioned therein acknowledged this 14th day of January, 1901.

LINDLEY & EICKHOFF,
W. J. McGEE,
F. J. SOLINSKY,
Attorneys for Argonaut Mining Company, Defendant in Error.

207 In the Supreme Court of the State of California.

ARGONAUT MINING Co. (a Corp.), Plain. and Resp.,
vs.
KENNEDY MINING AND MILLING Co. (a Corp.), Def. and App. } Sac., 733.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of writ of error, trans. on appeal, opinion, and judgment, assignment of error, petition for writ, order allowing writ, citation, and bond as shown by the records of my office, and that the same constitutes the writ of error in this case.

Witness my hand and the seal of the court this 13th day of February, A. D. 1901.

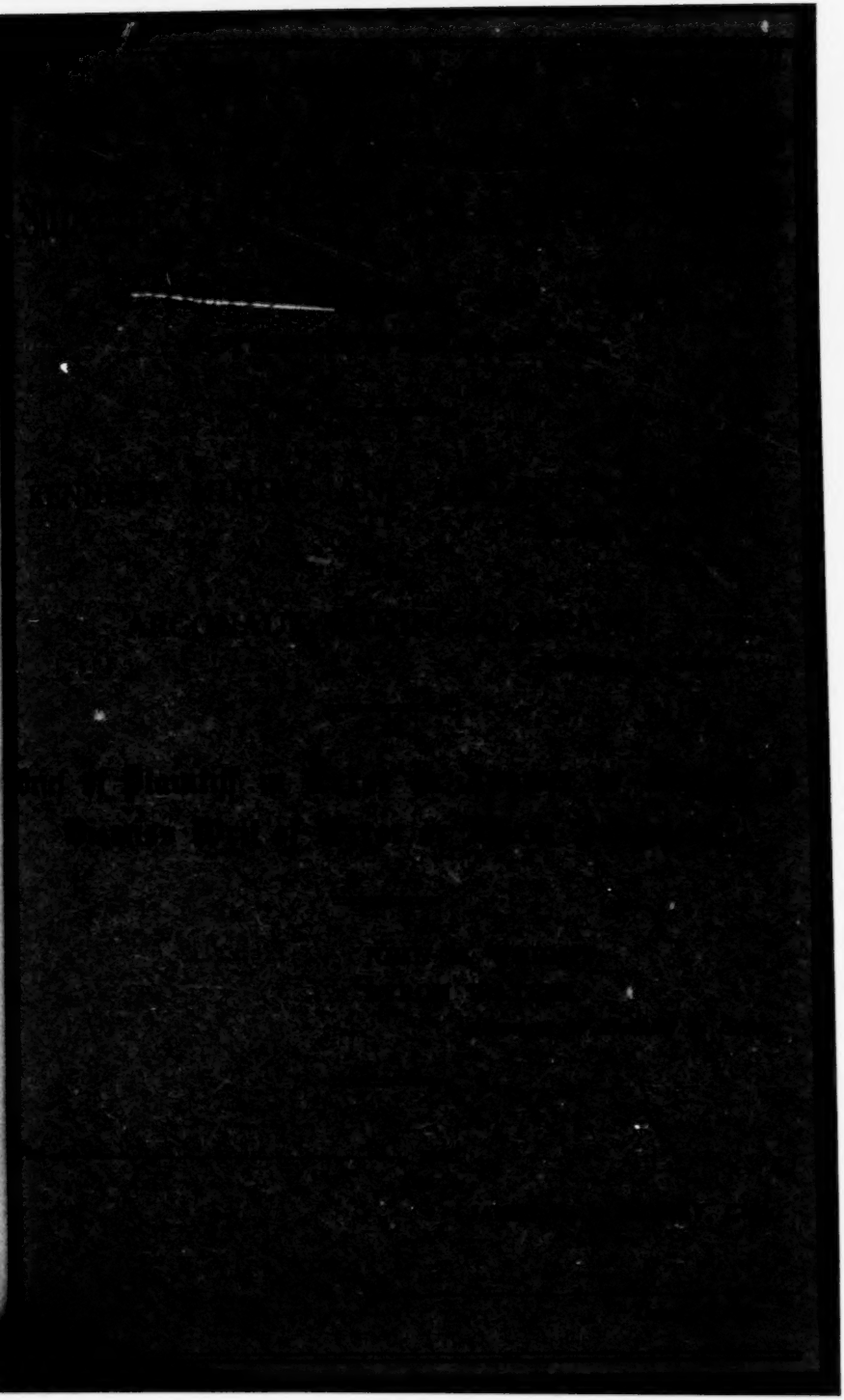
[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk*,
By W. E. BOODY, *Deputy*.

[Ten-cent United States internal-revenue stamp, canceled Feb. 13, 1901.]

[Endorsed:] Sac., No. 733. In the supreme court, State of California. Kennedy Mining and Milling Company *vs.* Argonaut Mining Company.

Endorsed on cover: File No., 18,060. California supreme court. Term No., 575. The Kennedy Mining and Milling Company, plaintiff in error, *vs.* The Argonaut Mining Company. Filed February 23, 1901.



IN THE

Supreme Court of the United States.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,

VS.

ARGONAUT MINING COMPANY,
Defendant in Error.

Brief of Plaintiff in Error in Answer to Motion to Dismiss Writ of Error or to Affirm Judgment.

Kennedy Mining and Milling Company, plaintiff in error, answering the motion of defendant in error to dismiss writ of error or to affirm the judgment herein, respectfully shows:

That it is apparent from the record on this motion, and from the statement of facts set forth in the brief of defendant in error:

That both parties to this suit claim title to the same gold bearing vein and ore body and the proceeds of the ores extracted therefrom.

That the claim of title of plaintiff in error thereto is founded upon a patent of the United States issued to said company February 6th, 1893, under the provisions of the Act of Congress of May 10th, 1872, for the Silva Quartz Mine; See record, page 31, admitted fact XXVIII.

That the claim of title of defendant in error to the part of said vein which is in dispute, is founded upon a similar patent, issued to defendant's grantor Aug. 12th, 1872, under the same law, for the Pioneer Quartz Mine.

See Record, page 28, Fact XVI.

Both of the patents mentioned are in the usual form of pat-

ents issued by the United States for quartz claims under the said law.

That the apex of such vein is within the boundaries of said Pioneer claim as described in its patent, and the foot of the vein in its downward course, lies between the extended planes of the end lines of the Pioneer claim, and so far as the same is in dispute in this cause, lies within the vertical boundaries of such Silva claim. The relative positons of the two patented areas are correctly outlined on page 7 of the brief upon this motion, of defendant in error.

The end lines of the Pioneer Mine are not parallel to each other, but diverge in the direction of the dip of the vein. Kennedy Company has mined and extracted from said vein, within the vertical boundaries of the Silva Mine, ores of the value of $56099.95, and threatens to continue to mine the ores therefrom.

Neither party hereto makes any claim of title to the ore or the part of the vein in dispute, other than under and through such patents respectively.

Defendant in error brought this action in a superior court of the State of California to recover judgment in damages from Kennedy Company for the value of said ores extracted, and to obtain a perpetual injunction restraining said company from the commission of further trespasses upon said vein.

The pleadings put in issue the title of the parties to such ores and vein. The Superior Court of the State of California awarded to plaintiff (defendant in error) judgment as prayed for, both for damages and the injunction, and the Supreme Court of the State of California affirmed such judgment.

The case thus made is one in which the only vital question in dispute is, whether, by force of sections 2 and 3 of the Act of Congress of May 10th, 1872, entitled "An Act to promote the development of the mining resources of the United States", title to the property in suit passed to the plaintiff in error through its patent to the Silva Mine, or to defendant in error through its patent to the Pioneer Mine.

The decision of this question pivots alone upon the construction to be put upon the provisions of the Act of Congress mentioned; that is, if section 2 of the Mining Act is to be construed as requiring that the end lines of each claim (whether located before or since May 10, 1872) "shall be parallel to each other", and section 3, that the right of possession to the outside parts of veins "shall be confined to such portions thereof as lie between vertical planes drawn down as aforesaid

through the" (parallel) "end lines of their locations", then such construction would result in a judgment in favor of plaintiff in error.

On the contrary, if a proper construction of the said provisions of the Act of Congress of May 10, 1872, as to locations made prior to the passage of that act, but patented subsequent to its passage, is that such claims are not subject to such provisions and limitations as to the exercise of the extra-lateral right, and if none of the limitations of the act of May 10, 1872, or similar limitations, are applicable to such former locations notwithstanding the patent to the same was issued under the Act of May 10, 1872, such construction of the aforesaid provisions of the Act of May 10, 1872 would necessarily result in a judgment in favor of defendant in error.

This being the case made by the record, and the determination of the dispute upon the admitted facts resting solely upon the construction to be given to Acts of Congress, it conclusively follows that:

A CASE IS PRESENTED PLAINLY WITHIN THE JURISDICTION OF THIS COURT, BY WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA WHEN MEASURED BY EVERY TEST THAT HAS BEEN PRESCRIBED BY THE CONSTITUTION, BY CONGRESS AND BY THIS COURT.

This position is maintained upon the authority of the decisions of this court from the earliest period of its existence to the present time, and we confidently assert that during the whole period, there does not occur a break in the even current of judicial opinion upon the question. Without pretending to cite all of the cases in illustration of this point, we will hazard being tedious in the production of extracts from enough of the cases to show plainly that jurisdiction has here attached.

In Matthew v. Zane, 4 Cranch 382, it is said:

> Error to the state court of the state of Ohio, under the 25th section of the judiciary act, Vol. 1. p. 63.
>
> The plaintiff in error claimed title to land in the state of Ohio, under the act of Congress passed in 1800, and the decision of the state court was against him.

The defendant in error also claimed title to the same land under the same act of Congress.

The question was, whether in such a case this court had an appellate jurisdiction to revise the judgment of a state court.

Harper, for the defendant in error, contended, that the reason of bestowing upon this court the power of revising the decisions of the State courts, upon points arising under the laws of the United States, was merely to maintain the authority of the laws of the United States, against the encroachments of the State authorities. But that it was not intended to give this court the power to revise the decision of a state court, in a controversy between two of her own citizens, claiming under the same act of Congress; for whether the one or the other recovered, the authority of the laws of the United States was equally supported. The power was given merely to prevent the laws of the United States from being frittered away by state jealousies and state powers.

P. B. Key, contra, contended, that the intention was to give a uniform construction to the laws of the United States; and that whenever a state court of the highest grade shall have given a false construction to an act of Congress, to the prejudice of a right claimed under such act of Congress, this court is empowered to correct the decision; and that it is altogether immaterial whether both parties are citizens of the same state, or whether both claim under the same act of Congress.

The court at first hesitated as to the jurisdiction, but upon consultation together and deliberation,

MARSHALL, Ch. J., declared it to be the opinion of a majority of the judges, that this court has jurisdiction. That the third article of the constitution of the United States, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive.

It is supposed that the act intends to give this court the power of rendering uniform the construction of the laws of the United States, and the decisions upon rights or titles, claimed under those laws.

In Cohens v. Virginia, 6 Wheat. 379, Chief Justice Marshall uses this language:

If it be to maintain that a case arising under the con-

stitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.

In Osborn et al. v. The Bank of the United States, 9 Wheat. 821, this court has said:

We ask then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause.

In Ross vs. Doe, 1 Pet. 662, it is said:

It has been objected that this court has not jurisdiction of the case. By the second section of the third article of the constitution it is declared, "That the judicial power shall extend to all the cases arising under this Constitution, the laws of the United States, and treaties made, or to be made under their authority, etc." By the 25th section of the judiciary act of 1789, made in pursuance of this provision of the Constitution, it is enacted, "That a final judgment or decree in any suit, in the highest court of Law or Equity of a State in which a decision in the suit could be had, where is drawn in question the construction of any statute of the United States, and the decision is against the title or right, etc., specially set up or claimed by either party, etc., under such statute, etc.,

may be re-examined and reversed or affirmed by the Supreme Court of the United States upon a writ of error."

In this case the titles of both parties are derived under an Act of Congress; the construction of the statute is drawn directly in question; and the decision of the highest Court of Law of the State, is against title and right of the party, specially set up in his defense under the statute. This case is not distinguishable from the case of Matthews v. Zane (4 Cranch, 382) in which the jurisdiction of this court was maintained.

In Kissell v. The St. Louis P. S., 18 How. 19-28, this court has said:

> The conflicting titles both depend on Acts of Congress, and are submitted to this court on the whole record; and which we are called on to compare as was done in the cases of Matthews v. Zane, 4 Cranch, 382; Ross v. Barland, 1 Pet. 664; and Wilcox v. Jackson, 13 Pet., 509. This follows from the instruction given, which maintains that the title of the Board of Public Schools, under the certificate of the Surveyor-General, setting apart the land in dispute to the plaintiffs below, was superior to the defendants' title under Duncan's entry with the Register and Receiver; and that, therefore, the jury was directed to find for the plaintiff.

In Starin v. New York City, 115 U. S. 248, this court has said:

> The character of a case is determined by the questions involved. Osborn v. Bank of U. S. 9 Wheat. 824 (22 U. S. bk. 6, L. ed. 224). If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise, not. Such is the effect of the decisions on this subject. Cohens v. Virginia, 6 Wheat. 279 (19 U. S. bk. 5, L. ed. 284); Osborn v. Bank of United States, 9 Wheat. 824 (22 U. S. bk. 6, L. ed. 224); The Mayor v. Cooper, 6 Wall. 252 (73 U. S. bk. 18, L. ed. 852); Gold Washing & Water Co. v. Keyes, 96 U. S. 201 (Bk. 24, L. ed. 658); Tennessee v. Davis, 100 U. S. 264 (Bk. 25, L. ed.

650); Railroad Co. v. Mississippi, 102 U. S. 140 (Bk. 26, L. ed. 98); Ames v. Kansas, 111 U. S. 462 (Bk. 28, L. ed. 487); Kansas Pacific v. Atchison R. R. Co., 112 U. S. 416) (Bk. 28, L. ed. 795); Provident Savings Soc. v. Ford, 114 U. S. 641 (Bk. 29, L. ed. 261); U. Pacific R. R. Removal Cases, 115 U. S. 11 (Bk. 29, L. ed. 319).

And finally the principle is recognized in DeLamar's Nevada Gold Mining Co. v. Nesbitt, 177 U. S. 528, in this language:

> To raise a Federal question the right must be one claimed under a particular statute of the United States, the validity, *construction* or *applicability* of which was made the subject of dispute in the state court; and the decision upon such statute *must have been adverse to the plaintiff in error.*

The respective decisions of the trial and appellate court of the State of California rendered in this cause furnish an apt illustration of the possible divergency of construction of the Act of Congress of May 10th, 1872, to correct which contrariety of view, federal jurisdiction exists.

The Superior Court at the trial adjudged that the Argonaut Company "was the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the *end lines* of said Pioneer or Argonaut mine lot No. 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had, and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, *within said vertical planes*, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine."

See Assignment of Error XXI., Record p. 101.
See corresponding Exception, No 21, Record p. 71.

While this construction of the Act of May 10th, 1872, is claimed on behalf of plaintiff in error to be erroneous, yet it has the merit of following the philosophical reasoning and theory of Lindley on Mines (Sec. 577) even if it does permit an owner of a claim which has divergent end lines to "defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules." (Mr. Justice Field in Eureka case, 4 Sawyer, 322.)

The Supreme Court of the State of California, upon appeal, having before it the question upon its broadest merits as shown by the record, here construed the Act of Congress of May 10th, 1872, as follows:

> I think the law of 1872, instead of extending the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2 provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location."
>
> These words themselves, in my opinion, are sufficient to support the declaration of the court in the Eureka case. Speaking of the limitations provided in Section 3 of the Act of 1872, which I have noticed, of lodes to planes through the end lines, "The act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the Act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines."
>
> This proposition is substantially reiterated in Iron Silver Mine v. Elgin, 118 U. S., 194, and in many other cases including the latest to which our attention has been called —Walrath vs. Champion, 171 U. S., 293.
>
> It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode fifteen hundred and eighty-nine and 94/100 linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth * * * Provided that the right of possession to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added as a condition, "that the grant hereby made is restricted

to the land hereinbefore described as Lot No. forty-eight (48), with fifteen hundred and eighty-nine and 94/100 linear feet of the Pioneer quartz vein, lode, ledge or deposit throughout its entire depth," etc.

I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion, that a patent to a location with end lines diverging in the direction of the strike* does not convey all within those planes, but at the most not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extra-lateral rights at all. Such would be the law if the location were under the law of 1872, and as the patent to the Pioneer was issued after that law took effect, counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extra-lateral rights.

It is too plain for argument that the record upon this motion shows a case involving a federal question.

THERE IS NO MERIT IN THE CONTENTION OF DEFENDANT IN ERROR THAT PLAINTIFF HAS NOT PROPERLY RAISED A FEDERAL QUESTION IN THE RECORD.

There are two complete answers to such contention.

1. WHERE, AS IN THIS CASE, THE QUESTION NECESSARILY INVOLVED IS ONE OF THE CONSTRUCTION TO BE PLACED UPON A STATUTE OF THE UNITED STATES, NO NECESSITY EXISTS THAT SUCH FEDERAL QUESTION SHOULD BE AFFIRMATIVELY SET OUT AS SUCH UPON THE RECORD.

In the case of Kaukauna W. Co. vs. Green Bay Co., 142 U. S. (U. S. Book 35, p. 1009), it is held:

"This court has had frequent occasion to hold, that it is not always necessary that the federal question shoul ap-

*The word "strike" was used here inadvertently. The word dip was intended.

pear affirmatively on the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case of the state court."

In Columbia W. P. Co. vs. Columbia Electric Co., 172 U. S. 488, this court held:

> But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here.

Even if plaintiff in error had been without title in the Silva ground, and judgment as in this cause had gone against it, yet the case would have presented a federal question, although it had not specially set up or claimed, any right or title under any act of Congress, for the right of recovery would necessarily depend upon the construction of an act of Congress.

Starin vs. N. Y. City, cited above.

2. THE FEDERAL QUESTIONS INVOLVED WERE SUPERABUNDANTLY SET UP AND CLAIMED IN BOTH THE SUPERIOR AND SUPREME COURTS OF THE STATE OF CALIFORNIA, AT THE PROPER TIMES AND IN THE PROPER MANNER.

In the stipulation agreeing upon a statement of the facts in this case, it was provided that each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the Court the same as though made in open Court or as though specifically set forth in this stipulation.

And in accordance with this right reserved, plaintiff in error at the trial made its objections to certain of said agreed facts and to the competency and legal effect thereof as follows:

DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U.S.Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pioneer Gold and Silver Mining Company the Pioneer Quartz Mine, Lot No. 48, as the same is described in said letters patent, a copy of which is set forth in *haec verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;

Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed statement showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof.

Defendant bases its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer Quartz Mine and the facts matters and things therein recited, upon the following grounds to-wit:

(a) All and singular each and every the fact so objected to including all and singular each and every the said patent to said Pioneer Quartz Mine, Lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: ALTHOUGH IT IS TRUE that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the "Pioneer Vein," and that the

apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that, as shown by said Pioneer patent and by the complaint herein and by reference to said "Exhibit A," the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west and easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being North Eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said vertical east side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendants Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by

said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the Development of the Mining Resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz Mine, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48 should or could attach to said Lot No. 48 and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot. No. 48, AND THEREFORE, the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

(b) All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said Lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said Lot No. 48,—

THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled " An Act to promote the development of the Mining Resources of the United States " under which said Pioneer patent was issued and especially because of the provisions of sections two (2) and three (3) of said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

(c) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

(d) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this said patent purports to grant only 1589 94-100 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1589 94-100 linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1589 94-100 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1589 94-100 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1589 94-100 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1589 94-100 linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that, even though the grant of 1589 94-100 linear feet of said Pioneer vein

mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

(c) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said Lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1589 94-100 linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein, said south end line of said Lot No. 48, constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line of said Lot No. 48, to-wit, from the north end of said vein parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48, which is definable by reference to the boundaries of said Lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1450, 1550, 1650 and 1750 levels south of a vertical plane drawn down through the north end line of said Lot No. 48 extended indefinitely in its own direction North seventy-four (74) degrees and fifty-one (51) minutes East, and that between Oc-

tober 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said Pioneer vein southerly from said vertical plane but within the vertical boundaries of said Silva Quartz Mine, and that the gross value of said 2,604 tons of ore was $62,218.45 and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;

Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'.

Defendant bases its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to-wit:

(a) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: ALTHOUGH IT IS TRUE that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 throughout the entire length of said Lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that as shown by said Pioneer patent and by the complaint herein and by reference to said "Exhibit A,"

the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said east vertical side line therof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by reference to said paragraph XXIII and to said " Exhibit A," all of said ores were extracted outside of and far easterly from said Lot No. 48 and at points where vertical planes drawn down through the end lines of said Lot No. 48 extended in their own directions respectively, are distant from each other more than 1900 feet, AND IT IS ALSO TRUE, that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled " An Act to promote the development of the mining resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz Mine, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying

outside the vertical boundaries of said Lot No. 48, should or could attach to said Pioneer Quartz Mine, and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said Lot No. 48, AND THEREFORE the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; AND THEREFORE said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, AND THEREFORE did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to said plaintiff; and

(b) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said Lot No. 48 and within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said Lot No. 86, and DEFENDANT further under said statutes and legislation of the United States, SPECIALLY SETS UP AND CLAIMS immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said Lot No. 86 or any thereof and DEFENDANT FURTHER SPECIALLY SETS UP AND CLAIMS immunity from and against the claims of plaintiff to said 2,604 tons of

ore and to the substance contained within the vertical boundaries of said Lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said Lot No. 48 and in the direction of said divergence to points distant more than 900 feet from said Lot No. 48. THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled " An Act to promote the development of the Mining Resources of the United States," under which the U. S. patent to said Lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said Lot No. 86, or any thereof; and

(c) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

(d) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1589 94-100 linear feet of said Pioneer Vein with the exclusive right to said 1589 94-100 linear feet of said vein throughout its entire depth although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1589 94-100 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1589 94-100 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint whether it is the intention of plaintiff to claim that certain segment of

1589 94-100 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1589 94-100 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1589 94-100 linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

(e) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said Lot No. 48, such part so defined must be either (1) that certain segment of 1589 94-100 linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said complaint, said south end line of said Lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line of said Lot No. 48, to-wit, from the north end of said vein, parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48 which is definable by reference to the boundaries of said Lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint.

And THIS DEFENDANT SPECIALLY SETS UP AND CLAIMS that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by plaintiff to the ores in question by reason of its ownership of the Pioneer

Quartz Mine, Lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva Quartz Mine, Lot No. 86, is involved: First, the construction of the Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States," under the provisions of which plaintiff acquired its title to said Lot No. 48; and, second, the construction of Chapter Six of Title Thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said Lot No. 86.

And all and singular each and every of such objections are so SPECIALLY SET UP AND CLAIMED BY DEFENDANT so as to apprise the court that the Federal Questions so involved are presented for its consideration and decision.

These several objections were set up and claimed by plaintiff in error at the trial, and were overruled by the court as appears in the bill of exceptions contained in the record.

See Objections in Bill of Exceptions, Record p. 46 to 54.
" Ruling on Objections, Bill of Exceptions, " " 62 " 70.
" Assignments of Error " " 92 " 101.

The questions and principles of law involved in such objections, inhered in the decision and judgment of the trial court, and corresponding exceptions were taken by plaintiff in error to the various parts of such decision and judgment, and are included in the bill of exceptions and assignment of error herein.

See Bill of Exceptions, Record pp. 70 to 72.
" Assignment of Error, " " 101 " 103.

Counsel for defendant in error unfortunately relies upon the case of *Dower vs. Richards, 151, U. S. 658-667*, for the position that "the reception by the trial court of immaterial and incompetent evidence in no sense involves a federal question of which this court will take cognizance."

Brief of defendant in error, p. 12.

Reading the quotation from that case, as it appears in their brief, one gets the idea that this court used the quoted language as a substantive proposition; but an inspection of the report clearly indicates that in order to get the quotation, it

was necessary to cut a sentence into two parts, use the part which suited the purpose and omit that which controlled the sense. The paragraph of the report reads as follows :

> When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron:
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> " The powers of the Supreme Court are limited in cases coming up from the state courts, under the 25th section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction."
>
> *Dower* vs. *Richards*, 151 U. S. 667.

It is quite apparent that the authority cited ranges upon the side of the question favorable to the jurisdiction in this case.

As that case was cited "parenthetically" in terms, it may not be out of place to likewise here apologize for "taking it away," and using it adversely.

It is claimed by defendant in error that " the Supreme Court of California not only declined to give effect to the evidence considered by the trial court over the Kennedy Company's objection, but held tentatively that the facts objected to were not material."

Brief of Defendant in Error, p. 12-13.

If the case presented by the record shows one of jurisdiction here, the ruling of a state court even to the contrary would avail nothing.

The Supreme Court of California did not say that those objections which related to the Federal questions involved were based on the ground of immateriality or so treated by it,—but quite to the contrary, it said:

> "The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence."

Inasmuch as objections numbered 21 to 24 inclusive were not treated by the Supreme Court of California as being immaterial, nor so claimed by defendant in error to have been treated by that court, it is hardly fair to say, as is done on behalf of defendant in error,—"That this class of objections and "rulings to which is appended the assertion of Federal Ques- "tion heretofore quoted are entirely eliminated from the case "by the action of the Supreme Court of California."

See page 13 of Brief of Defendant in Error.

It is claimed that plaintiff in error should have predicated the federal questions raised in the State Court upon the Act of Congress of July 26, 1866, rather than as arising upon the Act of May 10, 1872.

Without conceding that in this case it was necessary to specially set up and claim a title, right or immunity under any law of Congress, for the reasons hereinbefore given, it is insisted that it was entirely proper for plaintiff in error to refer to the last-named act of May 10, 1872, and not to the former of July 26, 1866.

Both patents under which the titles of the respective parties have vested were issued after May 10, 1872, and under the provisions of the Act of that date.

By the expressed terms of the 9th section of the Act of May 10, 1872, the first, second, third, fourth and sixth sections of the Act of July 26, 1866, *were repealed*.

The repeal is unlimited and unqualified as such, and the mere saving clause, "but such repeal shall not affect existing rights," does not detract from the repeal which was complete.

In the maintenance of jurisdiction in this case, it is sufficient to say that the two patents in conflict are issued under the law of 1872, and that the claim specially set up in the State Court properly referred to that law.

The fact that one of the patentees can possibly invoke also the protection of rights which accrued under the prior law, does not necessarily imply that such prior law is yet in force.

WHENEVER THE ACT OF MAY 10, 1872, MODIFIES OR CONFLICTS WITH THE ACT OF JULY 26, 1866, IN ITS APPLICATION TO CLAIMS LOCATED BEFORE THE PASSAGE OF THE ACT OF 1872, EVEN THOUGH SUCH CLAIMS MAY HAVE PASSED ENTRY, THE LAW OF 1872 MUST PREVAIL.

The Bill of Exceptions in the Eureka Case, 4 Sawy. 302, shows that a series of propositions were specifically presented to and ruled on by the Court. The third and fourth of these propositions and rulings were as follows:

3D EUREKA PROPOSITION.

"3d. Claimants on mining lands under the said Act of "July 26, 1866, who had, prior to the 10th day of May, "1872, complied with the terms of said first named act, "and to which there was no adverse claim, were entitled "to enter such land and receive a patent therefor, granting "such mine, together with the right to follow such lode or "vein therein with its dips, angles and variations al- "though it might enter the land adjoining, together with "a reasonable quantity of surface for the convenient "working of the same as fixed by local rules."

RULING.

"3d. The third proposition is sustained, the words '*to* "*any depth*' being inserted."

4TH EUREKA PROPOSITION.

"4th. The rights and interests of claimants as referred "to in the last preceding proposition were not impaired "or affected in any way by the Act of May 10, 1872, above "referred to."

RULING.

"4th. The fourth proposition is sutained, the words '*ex-* "*cept as specified in the Act of 1872*' being added at the end."

And see:

Lakin v. Dolly, 53 Fed. 333;
Lakin v. Roberts, 54 Fed. 461;
Lakin v. Roberts, 154 U. S. 507;
Carson City v. North Star, 73 Fed. 597;
Carson City v. North Star, 83 Fed. 662;
Michigan v. Rust, 168 U. S. 589;
Del Monte v. Last Chance, 171 U. S. 55;
Brown v. Hitchcock, 173 U. S. 473;
Botillier v. Dominguez, 136 U. S. 238.

In Del Monte v. Last Chance, *supra*, it is said in reference to the Act of 1866, "Nowhere was there any express limitation as to the amount of land to be conveyed."

But Lakin v. Dolly, *supra*, was where patent for a mine was applied for in 1867 and the patent was issued in 1877. The surface patented was in excess of 300 feet on one side of the lode. The Court held that the provisions of Section 2320 R. S. of U. S. relating to the width of claims were universal in their application and declared void the excess above 300 feet.

In the same portion of said Section 2320 appears the provision, "the end lines of each claim shall be parallel to each other."

Lakin v. Dolly was reviewed by the Court of Appeals in Lakin v. Roberts, 54 Fed. 461. Here the Court say:

> "It is not contended that plaintiff's interests were so far "vested that by that act" (the Act of May 10, 1872) "Congress had no power to limit or vary them. We shall "assume, therefore, that *Congress had this power, and, hav-* "*ing it, we think it exercised it in the provisions we have quoted.* "The language of the section of the Revised Statutes must "be confined to preserving the application, and of *all rights* "*except the size of the claim, length and width of it.*
>
> "All the provisions of the statute would not otherwise "be given effect. The Land Department, therefore, had "no power to issue a patent for a greater width of land "than 300 feet, and the patent in this case in excess "of 300 feet is void. Doolan v. Carr, 125 U. S. 624; 8 Sup. "Ct. Rep. 1228, and the other decisions cited in the opin- "ion of the learned judge who tried the case in the Cir- "cuit Court."

An application for a review of the two cases last named, by

writ of error or by writ of certiorari, was made to the U. S. Supreme Court, *but both writs were refused.*

Lakin v. Roberts, 154 U. S. 507.

In Carson City v. North Star, 83 Fed. 662, the Court of Appeals reviewed the Lakin cases and declared that the decision therein rendered was based on Section 2320, Rev. Stats. of U. S.

In Carson City v. North Star, 73 Fed. 597, after in effect defining the end line rule under the law of 1866 to be as adopted in the Eureka Case, 4 Sawy. 302, the Court says:

> "Although Section 9 of the Act of 1872, in repealing "certain parts of the old law, provided that 'such appeal "'shall not affect existing rights,' *the courts have held that, "when any claim is patented, those rights are controlled by the "patented lines."*

In Del Monte v. Last Chance, *supra*, it is said:

> "By Section 2319, quoted above, the mineral deposits "which are declared to be open to exploration and pur- "chase, are those found in lands belonging to the United "States, and such lands are the only ones open to occupa- "tion and purchase.
>
> *"While this is true, it is also true that until the legal title "has passed, the public lands are within the jurisdiction of the "land department, and, although equitable rights may be estab- "lished, Congress retains a certain measure of control. Mich- "igan Land & Lumber Company vs. Rust, 168 U. S. 589. "The grant is, as is often said, in process of administration.*
>
> "Passing to Section 2320, beyond the recognition of the "governing force of customs and regulations and a dec- "laration as to the extreme length and width of a mining "claim, *it is provided that 'no location of a mining claim "'shall be made until the discovery of the vein or lode within "'the limits of the claim located. * * * The end lines "'of each claim shall be parallel to each other.'*"

All these decisions cited appear to harmonize with that of Lakin v. Roberts, 54 Fed. 461, wherein Judge McKenna, speaking for the U. S. Court of Appeals, says in effect that those sections of the Act of 1872 providing for the preservation of existing rights, *must be read together with those provisions of the same statute concerning the length and width of claims.* The Court's language is:

> "The language of the section of the Revised Statutes "must be confined to preserving the application and of all

"rights except the size of the claim, length and width of it. "*All the provisions of the statute would not otherwise be given* "*effect.*"

From these considerations it is made plain that in specially setting up and claiming the federal question in the state court, plaintiff in error was correct in referring to the Act of Congress of May 10, 1872, instead of the repealed act of July 26, 1866.

THAT THE MOTION OF DEFENDANT IN ERROR TO AFFIRM THE JUDGMENT OF THE STATE COURT SHOULD BE DENIED IS EQUALLY PLAIN.

UNDER THE ESTABLISHED PRACTICE OF THIS COURT, THERE IS AMPLE "COLOR" IN SUPPORT OF OUR CLAIM OF THE EXISTENCE OF A FEDERAL QUESTION WHICH WARRANTS CONSIDERATION UPON THE MERITS AFTER A HEARING IN REGULAR ORDER.

Millingar vs. Hartupee, 73 U. S. 258 (18-829);
City of New Orleans vs. Water Works, 142 U. S. 79-93;
Hamblin vs. Western Land Co., 147 U. S. 532;
Douglass vs. Wallace, 161 U. S. 348.

Upon the merits of the federal question claimed, plaintiff in error is not only prepared to show "color" or probable cause, warranting the hearing upon the merits of the writ of error herein, but as well to show that upon the hearing the judgment of the Supreme Court of the State of California should be reversed.

While candor compels counsel for plaintiff in error to say that there has been no decision of this court directly holding that the requisite of parallelism of end lines of a location entered under the Act of 1866 and patented under the Act of 1872, exists as essential to support the extra-lateral right, yet it is confidently asserted that such is the only logical and correct conclusion to be arrived at from the application of the germane principles of the decisions of this court rendered since the decision of the Eureka case, the effect of which decisions we claim to be, that the Eureka case cannot now, even if it ever could in the past, be considered as authority decisive of the law of the question here involved.

In the case of Richmond Mining Co. vs. Eureka Mining Co. (103 U. S. 839) commonly called the Eureka case, the decision of this court was mainly based on the estoppel of the agreement between the parties. After treating of such agreement, this court says:

> "*This disposes of the case.* The Richmond Company is "in no condition to dispute the validity of the Eureka's "patents for the At Last and the Margaret, because the "end lines of the survey are not parallel, as it has agreed "with the Eureka for a consideration, not to work in the "limestone to the south and east of the compromise line."

Next follows the expression, "*upon the face of the patents* the United States has granted to the Eureka the right to all veins, etc.," relied upon by defendant in error.

The only other statement of the rule that parallelism of end lines was not required under act of 1866 occurs in the case of Iron Silver Mining Co. vs. Elgin Co. (118 U. S. 186), in which case no such question was involved, as all locations therein mentioned were of date subsequent to May 10th, 1872.

When viewed in the light of subsequent decisions of this court, the reflection forces itself upon us that the court in passing upon the Eureka case placed main stress upon the matter of the agreement as to the compromise line through the Potts Chamber, and not upon as wise and thorough a view of the statute relative to the extra-lateral right as has been rendered necessary in subsequent cases where the absence of such compromise agreement or estoppel caused the requirements of the statute to be reasoned out, distinguished and applied.

This court has not, since the decision of the Eureka case, been called upon to decide the question presented for its decision in this cause, but in the twenty years since that decision, many cases involving cognate questions have been decided here, establishing such principles relative to the extra-lateral right, as are irreconcilable with the theory that the right is to be exercised within planes drawn at right angles to the general course of the vein at its end points, and irrespective of the direction of the end lines of the location.

The Flagstaff case (98 U. S. 463) construed a patent issued under the law of 1866, and compared that law with that of 1872, using this language:

> "The language of the Act of 1866, 14 Stat. at L., 251, in relation to 'a vein or lode' is, 'That no location hereafter made shall exceed two hundred feet in length *along the*

vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein *to any depth*, with *all its dips, variations and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules,' etc. The Act of 1872, 17 Stat. at L. 91, is more explicit in its terms; but the intent is undoubtedly the same, as it respects end lines and side lines, and the right to follow the dip outside of the latter."

* * * * * * * * * * * * * * *

"As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, which lines are those which are crosswise of the general course of the vein on the surface."

In King vs. Army Com. M. Co. (152 U. S. 227-8), reversing the Supreme Court of Montana, this court says:

"It is evident from the provisions cited (U. S. R. S. Sec. 2324) that the *location as made and defined* must control not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights."

* * * * * * * * * * * * * * *

"The Court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants, under the statute. It cannot relocate his claim and make new side lines or end lines."

In Iron Silver M. Co. vs. Elgin M. & S. Co., 118 U. S. 196, it is held:

"The provision of the statute, that the locator is entitled throughout their entire depth to all the veins, lodes or ledges the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins if they are not identical.

* * * * * * * * * * * * * * *

"If it is expedient to change the rule, legislative action should be invoked, as it would operate only in the future, and not judicial decision which would affect past cases as well.

"This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the Flagstaff Case, Mining Co. v. Tarbet, 98 U. S. 463, (Bk. 25, L. ed. 253)."

In Del Monte M. & M. Co. vs. Last Chance M. & M. Co., 171 U. S. 87, after a review of these cases this court says that they settle the proposition,

"That the lines of the location as made by the locator, are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location."

The last case decided of which we have report touching the question of extra-lateral right is that of Walrath vs. Champion Co., 171 U. S. 293, in which the court was called upon to construe a patent issued Apr. 28th, 1871, upon a location made under the law of 1866.

In this case the *patented area* of the Providence location presented a northerly end line having two planes, that is a broken or elbowed line, thus, "f g h" f—g—g—h. The southerly end line was parallel to the line g—h, and hence not parallel with f—g. The Providence vein, upon which the location was made passed across the line g—h, and the "Contact" vein in dispute passes across the line f—g.

The question was which of these lines constituted the direction of the plane by which to control the right to follow the "Contact" vein on the dip.

The court says:

"The extent of the right passing under the act of 1866 has been decided by this court,"

and proceeds to quote in support of the statement, the doctrines of the Flagstaff case as herein given, and adds:

"And after stating that the act of 1872 was more explicit than the act of 1866, but the intent of both undoubtedly the same, as it respects lines and side lines, and the right to follow the dip outside of the latter, etc."

After further quoting the Flagstaff opinion, the court says:

> "This law was followed and applied in Argentine Co. vs. Terrible M. & M. Co., 122 U. S. 478; and in Iron Silver M. Co. vs. Elgin Min. & S. Co., 118 U. S. 176; King vs. Army & Silversmith Con. Min. Co., 152 U. S.
>
> "The locations passed upon in these cases were made under the act of 1872, *but we have seen* that the intent of that act and the act of 1866, 'as it respects end lines and side lines' was the same."

The court proceeds to quote approvingly from the opinion in the Del Monte case, as follows:

> "First, the location as made on the surface by the locator determines the extent of rights below the surface."

Finally, Mr. Justice McKenna, in the opinion in the Walrath vs. Champion case says:

> "*It may be* that the end lines need not be parallel under the act of 1866; may converge or diverge, and may even do so as to new veins, *of which however we express no opinion*, but they must be straight,—no other define planes which can be continuous in their own direction within the meaning of the statute."

This language indicates very plainly that this court did not wish to hold that the decision in the Eureka case, or the casual assertion in the Elgin case, foreclosed the question of necessary parallelism of end lines to warrant the exercise of the lateral right in locations made under the act of 1866. Surely the Court would not have cautiously used the expression "*of which we express no opinion*," if the doctrine had been by it considered settled or foreclosed, as is claimed by defendant in error.

From these principles, we deduce the conclusions:

1. The ownership as to length upon the course or strike of a vein, both on the surface and beneath the surface is limited by the *surface lines* of the location.

2. That the "outside parts" of such vein beneath the surface to which the extra-lateral right attaches cannot *exceed such length so fixed by the surface lines.*

3. That the end line planes, to justify a claim of extra-lateral right must not be divergent, in the direction of the dip of the vein.

4. That where the end line planes are divergent in the direction of the dip of the vein, no extra-lateral right exists.

WHEREFORE, Plaintiff in Error insists that both the motion to dismiss the writ of error herein, and the motion to affirm the judgment of the Supreme Court of the State of California, ought to be denied.

Respectfully submitted,

JOHN M. WRIGHT,

BYRON WATERS,

Counsel for Plaintiff in Error.

No. 256

MAR 10 1902

JAMES H. McKENNEY,
Clerk.

Wright, Waters & Harber for P. C.

In the Supreme Court of the United States

OCTOBER TERM, 1901.

Filed Mar. 10, 1902.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error.

vs.

ARGONAUT MINING COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief of Plaintiff in Error.

JOHN M. WRIGHT,
BYRON WATERS,
Attorneys for Plaintiff in Error.

JOHN GARBER,
Of Counsel.

....., 1902.

JAMES H. McKENNEY, Clerk.

By ..... Deputy Clerk.

(18,090.)

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FOLD OUT IS TOO LARGE TO BE FILMED

IN THE

Supreme Court of the United States.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of California.

I.

STATEMENT OF THE CASE.

(The map, "Exhibit A," on opposite page, is the same "Exhibit A" found in the Record, between pages 34 and 35.)

On the sixth day of February, 1893, plaintiff in error became the owner of that certain mineral land situated in the County of Amador, in the State of California, known as the Silva Quartz Mine, the boundaries of which are set out as Lot No. 86 on the map "Exhibit A".

Record, between pages 34 and 35.

The title of plaintiff in error to said land is by patent of the United States, issued to plaintiff in error on the sixth day of February, 1893.

Record, pages 31 to 33.

During the period of time between October eighth, 1895, and the twelfth day of December, 1895, plaintiff in error, being the owner and in possession of said land, extracted,

removed and converted from places within the vertical boundaries of the said Silva Quartz Mine, two thousand six hundred and four (2,604) tons of gold bearing ore of the net value of fifty-six thousand ninety-nine dollars and ninety-five cents ($56,099.95).

Record, page 30.

Defendant in error claims to have been the owner of the ore so taken from the said Silva ground, because of its ownership of that other mineral land, the surface boundaries of which are shown on map "Exhibit A" marked "Pioneer (Argonaut) Q. M., Lot No. 48", the end lines of which land (Lot No. 48) are not parallel to each other, and because of the existence within said Lot 48 of a vein of gold bearing quartz having its apex within the area of said Lot 48, which vein, on its dip and on its downward course and between vertical planes drawn downward through said non parallel and divergent end lines extended, passes out of the area of said Lot 48 in the direction of the divergence of said end lines and into the area of said Lot 86, and therein constitutes the vein and ore body mined by plaintiff in error as before stated.

Complaint. Record, page 4.
Statement of Facts. Record, page 30.

The entry of said Pioneer tract, Lot 48, and the payment therefor, were made prior to May 10, 1872, and under the law of the United States of July 26, 1866, and the patent of the United States therefor was issued to the grantor of the defendant in error, on August 12, 1872, reciting that the said patent was issued in pursuance of the Act of Congress of July 26, 1866, entitled "An Act granting the right of way to ditch "and canal owners over the public lands and for other pur-"poses," and the act amendatory thereof, approved July 9, 1870, and the act approved May 10, 1872, entitled "An act "to promote the development of the mining resources of the "United States."

Record, pages 25 to 28.

On August 5, 1897, defendant in error, Argonaut Mining Company, filed its complaint in the Superior Court of the County of Amador, State of California, as plaintiff, against

plaintiff in error as defendant, in which said Argonaut Mining Company alleged ownership of the area of Lot 48 aforesaid, describing its boundaries and the said divergent and non parallel end lines thereof, and alleging ownership also of all that part of a vein apexing within the area of Lot 48 aforesaid, on its downward course between the planes of such end lines of Lot 48 produced and extended each in its own direction.

Such complaint alleged the extraction of ore from said vein by plaintiff in error, of the value of $135,000, and a threat to continue such extraction unless restrained from so doing by injunction.

The prayer of said complaint asked judgment for the value of the ore extracted, also for an injunction restraining plaintiff in error from further extracting ores from such vein within the limits so claimed by defendant in error.

Record, pages 1 to 4.

To this complaint the defendant, Kennedy Mining and Milling Company, plaintiff in error, on February 14, 1898, made answer as follows: Admitted the ownership by plaintiff therein, defendant in error, of the area of the Pioneer (Argonaut) Mine, Lot 48; admitted the surface form thereof and its non parallel and divergent end lines; denied the ownership of the plaintiff therein, defendant in error, of any part of such vein lying without the surface boundaries of the Pioneer (Argonaut) Mine (Lot 48) extended downward vertically; denied that plaintiff therein, defendant in error, ever was the owner of any ore or substance of said vein lying within any land adjoining or without said Lot 48; denied the extraction or taking of any ore, or of any value, by plaintiff in error, from any lands or premises or vein belonging to defendant in error; denied that defendant in error sustained any damage by reason of any act of plaintiff in error complained of in said complaint; and denied that plaintiff in error threatened to mine or work any vein belonging to defendant in error, or to take, convert, or remove any such ore belonging to defendant in error.

Record, pages 5 to 10.

Thereafter, by orders of Court duly made, said cause was transferred from said Superior Court of the County of Ama-

dor to the Superior Court of the County of Calaveras, State of California.

Record, pages 11 to 12.

The cause was tried before the Court last named, upon an agreed statement of facts, the substance of which, material to be presented upon this writ of error, is hereinbefore set out.

Record, pages 12 to 34.

Thereafter, said Superior Court of said County of Calaveras, made and rendered its decision in writing, founded upon said agreed statement of facts, and made and rendered its conclusions of law and its judgment in said cause, to the effect that defendant in error was awarded judgment against plaintiff in error, for the recovery of the agreed value of the ore extracted by it as aforesaid, to wit, the sum of fifty-six thousand ninety-nine dollars and ninety-five cents, together with an injunction restraining plaintiff in error from further mining the aforesaid vein at any point between the extended end lines of said Lot 48.

Record, page 35.

Upon an appeal from said judgment, duly taken by plaintiff in error from said Superior Court to the Supreme Court of the State of California, the said Supreme Court on the 19th day of December, 1900, upon said appeal, rendered its decision and judgment in said cause, by the terms of which the said judgment of said Superior Court was *in all respects* affirmed.

Record, page 83.

Upon such judgment of affirmance, plaintiff in error has duly sued out a writ of error from this Court to the Supreme Court of the State of California in said cause.

II.

QUESTIONS INVOLVED.

The questions involved upon this Writ of Error are several.

First, whether defendant in error, whose Pioneer (Argonaut) claim was located, entered in the land office and paid for

under the act of Congress of July 26, 1866, has "the right to follow" the Pioneer "vein or lode with its dips, angles, and "variations to any depth, although it may enter the land "adjoining" (Sec. 2, Act of 1866) notwithstanding that the end lines of the location are not parallel to each other, and are divergent from each other in the direction of the dip of the vein.

Second, whether the rights of defendant in error to the Pioneer surface and vein so acquired as stated above, were qualified and limited by the provisions of Sec. 5 of the Act of Congress of July 26, 1866, providing, "That, as a further condi- "tion of sale, in the absence of necessary legislation by Con- "gress, the local Legislature of any State or Territory may "provide rules for working mines, involving easements, drain- "age, or other necessary means to their complete develop- "ment; and those conditions shall be fully expressed in the "patent." That is to say, whether Congress thereby expressly reserved the power to limit and define the extralateral right by subsequent legislation.

Third, whether, irrespective of the reservation above stated, the title of defendant in error on May 10, 1872, was "in process of administration" and hence held subject to the right in the Congress to change the law defining the planes within which the extralateral right might be exercised, and limiting the exercise of such right to claims or locations having parallel end lines.

Fourth, whether the act of Congress of May 10, 1872, entitled "an act to promote the development of the mining resources of the United States," is, with all its provisions, those prospective as well as those retrospective, valid as a remedial law, enlarging the rights of prior locators upon the public land, as well as limiting by definite description the extralateral right.

Fifth, whether the defendant in error has waived and thereby lost all right to follow the Pioneer vein into the adjoining land, by failing to reform its boundaries after the enactment of the law of May 10, 1872, and prior to the issuance of its patent, by making the end lines of its location parallel to each other.

Sixth, whether the requirement of Section two of the act of May 10, 1872, that "the end lines of each claim shall be

parallel to each other" is applicable to the Pioneer claim, Lot. 48.

Seventh, whether the defendant in error has "complied with the laws of the United States," which compliance, by the expressed terms of section three of the act of May 10, 1872, is made a condition precedent to the accruing of any extralateral right, by causing the end lines of its location to be so laid upon the ground as to be, not only not parallel to each other, but divergent in the direction of the dip of the vein.

Eighth, whether the provision of section two of the Act of May 10, 1872, that "the end lines of each claim shall be parallel to each other" is to be construed together with the *proviso* of section three that "their right of possession to such "outside parts of such veins or ledges shall be confined to such "portions thereof as lie between vertical planes drawn down-"ward as aforesaid through the end lines of their locations, "so continued in their own direction that such planes will "intersect such exterior parts of said veins or ledges."

Ninth, whether defendant in error, under its patent to the Pioneer mine, Lot 48, issued August 12, 1872, is entitled to exercise the extralateral right as to the Pioneer vein, by following such vein on its downward course into adjoining land, between planes of end lines not parallel to each other but so divergent from each other in the direction of the dip as to result in a gain of 400 feet in length along the course of the vein at the depth where the alleged trespass was committed.

Tenth, whether under such patent defendant in error is entitled to exercise the extralateral right between *any planes other than* those of the end lines of the Pioneer claim as patented.

III.

Manner in Which the Foregoing Questions Are Raised.

The questions involved upon this writ of error are raised in the following manner.

In the stipulation agreeing upon a statement of the facts in this case, it was provided that "Each or either party may

"serve on the opposite party and file in this cause * * * "a statement in writing setting forth specifically its objec- "tions to each fact the admission of which is objected to by "it for want of relevancy and materiality to and competency "to prove the issues presented by the pleadings or for want "of relevancy or materiality to or competency to prove such "issues, and such written statement of objections shall be "deemed and taken as part of the record of the cause and "the objections therein stated shall be ruled on by the Court "the same as though made in open Court or as though "specifically set forth in this stipulation."

In accordance with this right reserved, plaintiff in error at the trial made its objections to certain of said agreed facts, and to the competency and legal effect thereof, such objections being set out seriatim in the bill of exceptions contained in the record herein. Certain of said objections were overruled by the trial Court. To these rulings plaintiff in error properly reserved its exceptions. All of said objections, rulings, and exceptions are specifically set out in said bill of exceptions, and so made of record upon this writ of error.

Record, pages 54 to 73.

Every such action of the Court is made the subject matter of a separate and specific assignment of error, as is made to appear in the record herein, in the several assignments of error.

Record, pages 83 to 104.

IV.

Specifications of the Errors Relied Upon, in Which is Set out Separately and Particularly Each Error Asserted and Intended to be Urged by Plaintiff in Error upon the Hearing in this Court of the Writ of Error Herein.

In each of the instances in which in the following assignments of error mention is made of an "agreed statement," it is hereby intended to designate the agreed statement of

facts upon which the judgment herein is based, as set forth in the record.

Assignment of error No. 1. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"First. All and singular each and every the facts, stated in "paragraph IV of said agreed statement, showing among "other matters and things, the corporate capacity of Kennedy "Mining Company"; which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 1.

The ruling of the Superior Court upon said objection (exception No. 1) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decison and judgment herein.

Record, page 84.

Assignment of error No. 2. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Second. All and singular each and every the facts stated "in paragraph V of said agreed statement, showing among "other matters and things, that on October 13, 1870, said "Kennedy Mining Company applied for a patent to the Ken-"nedy quartz mine, lot No. 44, and that a diagram of said "mine was posted in the U. S. land office at Sacramento, Cal "ifornia, on October 15, 1870"; which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 2.

The ruling of the Superior Court upon said objection (exception No. 2) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 84.

Assignment of error No. 3. At said trial the defendant

specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Fifth. All and singular each and every the facts set forth "in paragraph IX of said agreed statement, showing among "other matters and things, that on March 15, 1871, the U. S. "surveyor general for California instructed William L. Mc-"Kim, a U. S. deputy mineral surveyor, to make patent sur-"vey of said Kennedy quartz mine;" which said objection was overruled by the court, to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 3.

The ruling of the Superior Court upon said objection (exception No. 3) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 85.

Assignment of error No. 4. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Sixth. All and singular each and every the facts stated "in paragraph X of said agreed statement, showing, among "other matters and things, that said McKim surveyed said "Kennedy quartz mine during April and May, 1871, and "thereupon returned said survey to the U. S. surveyor gen-"eral's office, and that on October 19, 1871, said surveyor "general approved said survey, and that on November 11, "1871, said Kennedy Mining Company entered and paid for "the mining claim so surveyed."

Defendant based its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to-wit:

"(a) All and singular each and every the facts so objected "to, are immaterial and irrelevant to all and singular each "and every the issues in this cause; and

"(b) All and singular each and every the facts so objected "to, are incompetent as evidence to limit or enlarge or explain "or anywise to control or modify or affect the terms or pro-"visions or legal effect of the patent issued to said Kennedy

"Mining Company for said Kennedy quartz mine, Lot No. 44, "on July 29, 1872, as shown by paragraph XI of said agreed "statement; and

"(c) All and singular each and every the facts so objected "to, relate only to the surface area to be embraced within said "Kennedy quartz mine, Lot No. 44, and in nowise relate to "any extralateral right claimed as attaching to said Ken- "nedy quartz mine, Lot No. 44, nor to any right or interest in "any part of any lode or lodes lying outside the vertical boun- "daries of said Lot No. 44; and

"(d) The agreement as to the common boundary line "between said Kennedy quartz mine and the Pioneer quartz "mine, set out in paragraph VIII of said agreed statement, "is not recited nor referred to in said patent to said Kennedy "quartz mine, nor was said agreement ever recorded in the "office of the county recorder of the County of Amador, "State of California, in which said Kennedy quartz "mine is situate, nor is it alleged in the complaint herein that "this defendant was a party to said agreement, nor that this "defendant ever had any notice or knowledge of the existence "of the same at the time it acquired its title to said Kennedy "quartz mine, Lot No. 44, or at the time when it acquired its "title to the Silva quartz mine, Lot No. 86, the patenting of "which is shown by the facts set forth in paragraph XXVIII "of said agreed statement; and

"(e) Defendant specially sets up and claims that all and "singular each and every the facts set forth in said para- "graphs IV, V, VII, VIII, IX, and X of said agreed statement, "are irrelevant and immaterial to all and singular each and "every the issues in this cause and are incompetent as evi- "dence to prove any of the facts alleged in the complaint "herein, because, as is shown by the facts set forth in para- "graph XXIII of said agreed statement, all of the ores in dis- "pute herein were extracted by defendant from places within "the vertical boundaries of said Silva quartz mine, and with- "out the vertical end boundaries of said Kennedy quartz "mine indefinitely extended, and because, notwithstanding "the existence of the facts set forth in said paragraphs IV, V, "VII, VIII, IX, and X of said agreed statement, this defend- "ant, by reason of its ownership of said Silva quartz mine, "Lot No. 86, which ownership is shown by the facts set forth "in paragraph XXVIII of said agreed statement, was at all of

"the times of the trespasses alleged in the complaint herein, "justly entitled under the statutes of the United States by "authority of which said patent to said Silva quartz mine was "issued, to wit, under chapter six of title thirty-two of the "revised statutes of the United States and legislation sup- "plemental thereto, to the exclusive right and title to take "and hold all of said ores and every part of the substance em- "braced within the area of said Silva quartz mine as described "in said Silva patent; and

"(f) As shown by the facts stated in paragraph XII of said "agreed statement, defendant makes no claim of title or right "to the ores forming the subject of dispute in this cause, by "reason of its ownership of said Kennedy quartz mine, Lot "No. 44."

Said 6th objection excepting in so far as the same relates to paragraphs seven (7) and eight (8) of said agreed statement, was overruled by the court; to which ruling the defendant did duly except and made the same of record as the defendant's exception No. 4.

The ruling of the Superior Court upon said objection (exception No. 4) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error, upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 85 to 86.

Assignment of error No. 5. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Seventh. All and singular each and every the facts set "forth in paragraph XI of said agreed statement, showing, "among other matters and things, that on July 29, 1872, the "Government of the United States issued to said Kennedy "Mining Company a patent for said Kennedy quartz mine, "Lot No. 44, said patent being set forth *in hacc verba* in said "paragraph XI;"

which said objection was overruled by the Court; to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 5.

The ruling of the Superior Court upon said objection (exception No. 5) and the affirmance of such ruling by the Supreme

Court of the State of California are designated as an assignment of error, upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 86 to 87.

Assignment of error No. 6. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Eighth. All and singular each and every the facts set forth "in paragraph XII of said agreed statement, in so far as such "facts show or tend to show that on December 28, 1886, said "Kennedy Mining Company, conveyed to this defendant all "the property and rights conveyed to it, the said Kennedy "Mining Company, by means of said letters patent issued July "29, 1872."

Defendant based its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to wit:

"(a) All and singular each and every of such facts are "immaterial and irrelevant to all and singular each and "every the issues in this cause; and

"(b) Defendant makes no claim of right or title to the ores "in dispute in this cause by reason of its ownership of said "Kennedy quartz mine, Lot No. 44; and

"(c) Plaintiff cannot establish a title in itself to the ores "in dispute in this cause by showing that defendant has no "title nor right to said ores by reason of its ownership of the "Kennedy quartz mine, nor by showing the limitations of the "patent to said Kennedy quartz mine; but plaintiff must rely "upon and clearly show its own title to said ores; and

"(d) Defendant claims title to the ores in dispute in this "cause by reason of its ownership of said Silva quartz mine, "Lot No. 86, and not by reason of its ownership of said Ken-"nedy quartz mine, Lot No. 44."

Said eighth objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 6.

The ruling of the Superior Court upon said objection (exception No. 6) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assign-

ment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 87.

Assignment of error No. 7. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Ninth. All and singular each and every the facts set "forth in paragraph XVII of said agreed statement, and the "facts shown by the plat designated as 'Exhibit A' in said "paragraph XVII, in so far as such facts show or tend to "show the boundary lines and surface form of said Kennedy "quartz mine, Lot No. 44;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 7.

The ruling of the Superior Court upon said objection (exception No. 7) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 87 to 88.

Assignment of error No. 8. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Tenth. All and singular each and every the facts set "forth in paragraph XVIII of said agreed statement, in so far "as such facts show or tend to show the southern end line of "said Kennedy quartz mine and the coincidence of the northern end line of said Pioneer quartz mine with a part of the "southern end line of said Kennedy quartz mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 8.

The ruling of the Superior Court upon said objection (exception No. 8) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assign-

ment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 88.

Assignment of error No. 9. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Eleventh. All and singular each and every the facts set "forth in paragraph XX of said agreed statement, in so far "as such facts show or tend to show the existence of a ledge of "rock in place bearing gold within said Kennedy quartz mine, "Lot No. 44, and the nature and extent of said vein within "said Kennedy quartz mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 9.

The ruling of the Superior Court upon said objection (exception No. 9) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 88.

Assignment of error No. 10. At the said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Twelfth. All and singular each and every the facts set "forth in paragraph XXI of said agreed statement, in so far "as such facts show or tend to show the existence and course "of a vein in said Kennedy quartz mine, Lot No. 44, and that "said vein crosses out of said Kennedy quartz mine into said "Pioneer quartz mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 10.

The ruling of the Superior Court upon said objection (exception No. 10) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assign-

ment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 89.

Assignment of error No. 11. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Thirteenth. All and singular each and every the facts "set forth in paragraphs XXIV and XXV of said agreed "statement, in so far as such facts show or tend to show the "existence of a vein or any vein in said Kennedy quartz mine "or the identity of such vein or any vein in said Kennedy mine "with the vein from which defendant extracted the ores in "dispute south of the line A-B-B', but within the vertical "boundaries of said Silva quartz mine, Lot No. 86;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 11.

The ruling of the Superior Court upon said objection (exception No. 11) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 89.

Assignment of error No. 12. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Fourteenth. All and singular each and every the facts set "forth in paragraph XXVII of said agreed statement, show-"ing that defendant became the owner of said Kennedy "quartz mine on December 28, 1886, and ever since has been "and now is such owner."

Defendant based its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV, and XXVII of said agreed statement, on the following grounds, to wit:

"(a) All and singular each and every the facts so objected

"to are immaterial and irrelevant to all and singular each "and every the issues in this cause; and

"(b) Defendant makes no claim of right or title to the ores "in dispute in this cause by reason of its ownership of said "Kennedy quartz mine, Lot No. 44; and

"(c) Plaintiff must establish its title and right to the ores "in dispute in this cause, if at all, by showing that in law as "well as in fact, said ores constituted part of the Pioneer "quartz mine, Lot No. 48, set up in the complaint herein, and "not by showing that defendant has no title nor right to said "ores by reason of its ownership of the Kennedy quartz "mine; and

"(d) Defendant claims title to the ores in dispute in this "cause by reason of its ownership of Silva quartz mine, Lot "No. 86, and not by reason of its ownership of Kennedy quartz "mine Lot No. 44;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 12.

The ruling of the Superior Court upon said objection (exception No. 12) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 89 to 90.

Assignment of error No. 13. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Fifteenth. All and singular each and every the facts "stated in paragraph VI of said agreed statement, showing "among other matters and things, that on January 13, 1871, "the Pioneer Gold and Silver Mining Company applied for a "patent to the Pioneer quartz mine, Lot No. 48 and that a "diagram of said Pioneer quartz mine was posted in the U. "S. land office at Sacramento, California, and on said Pioneer "mine;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 13.

The ruling of the Superior Court upon said objection (exception No. 13) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 90.

Assignment of error No. 14. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the Court as evidence or as possessing probative force herein, of—

"Eighteenth. All and singular each and every the facts "set forth, in paragraph XIII of said agreed statement, show- "ing among other matters and things, that on June 16th, 1871, "the U. S. surveyor general for California instructed said "William L. McKim to make patent survey of said Pioneer "Quartz Mine;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 16 (14)^2.

The ruling of the Superior Court upon said objection (exception No. 16 (14)^2, and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 90 to 91.

Assignment of erorr No. 15. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Nineteenth. All and singular each and every the facts "stated in paragraph XIV of said agreed statement, show- "ing among other matters and things, that said McKim com- "pleted his patent survey of said Pioneer quartz mine on "September 1, 1871, and thereupon returned said survey to the "U. S. surveyor general's office, and that on December 21, "1871, said surveyor general approved said survey, the afore- "said return of such survey of said Pioneer quartz mine being "set forth *in haec verba* in said paragraph XIV of said agreed "statement;"

which said objection was overruled by the Court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 15.

The ruling of the Superior Court upon said objection (exception No. 15) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 91.

Assignment of error No. 16. At the said trial the defendant specifically set forth, made and claimed its objections to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twentieth. All and singular each and every the facts "set forth in paragraph XV of said agreed statement, show- "ing among other matters and things, that on February 23, "1872, said Pioneer Gold and Silver Mining Company entered "and paid for said Pioneer quartz mine as so surveyed by said "William L. McKim, and that the receiver of said U. S. land "office thereupon issued his duplicate receipt evidencing such "entry and payment."

Defendant based its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV, and XV of said agreed statement, upon the following grounds, to wit:

"(a) All and singular each and every the facts so objected "to are immaterial and irrelevant to all and singular each "and every the issues in this cause; and

"(b) All and singular each and every the facts so objected "to are incompetent as evidence to limit or enlarge or explain "or anywise to control or modify or affect the terms or pro- "visions or legal effect of the patent issued to said Pioneer "Gold and Silver Mining Company for said Pioneer quartz "mine, Lot No. 48, on August 12, 1872, as shown by paragraph "XVI of said agreed statement; and

"(c) All and singular each and every the facts so objected "to relate only to the surface area to be embraced within said "Pioneer quartz mine, Lot No. 48, and in nowise relate to "any extralateral right claimed as attaching to said Pioneer "quartz mine, Lot No. 48, nor to any right or interest in any

"part of any lode or lodes lying outside the vertical bounda-
"ries of said Lot No. 48; and

"(d) The agreement as to the common boundary line be-
"tween said Kennedy quartz mine, and said Pioneer quartz
"mine set out in paragraph VIII of said agreed statement,
"is not recited nor referred to in said patent to said Pioneer
"quartz mine, nor was said agreement ever recorded in the
"office of the County recorder of the County of Amador, State
"of California, in which said Pioneer quartz mine is situate,
"nor is it alleged in the complaint herein that this defendant
"was a party to said agreement, nor that this defendant ever
"had any notice or knowledge of the existence of the same at
"the time it acquired its title to said Kennedy quartz mine,
"Lot No. 44; or at the time when it acquired its title to said
"Silva quartz mine, Lot No. 86, the patenting of which is
"shown by the facts set forth in paragraph XXVIII of said
"agreed statement."

Said twentieth objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as defendant's exception No. 16.

The ruling of the Superior Court upon said objection (exception No. 16) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 91 to 92.

Assignment of error No. 17. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-first. All and singular each and every the facts
"set forth in paragraph XVI of said agreed statement, show-
"ing, among other matters and things, that on August 12,
"1872, the U. S. Government issued to said Pioneer Gold and
"Silver Mining Company certain letters patent conveying or
"purporting to convey to said Pioneer Gold and Silver Mining
"Company the Pioneer quartz mine, Lot No. 48, as the same
"is described in said letters patent, a copy of which is set forth
"*in hacc verba* in said paragraph XVI, and defendant specially
"objects to the admission as evidence herein of said letters

" patent and all and singular each and every the facts, matters
" and things therein recited;"

which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 17.

The ruling of the Superior Court upon said objection (exception No. 17) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 92 to 93.

Assignment of error No. 18. At said trial the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

" Twenty-second. All and singular each and every the facts
" set forth in paragraph XXVI of said agreed statement,
" showing that said Pioneer Gold and Silver Mining Company
" conveyed said Pioneer quartz mine to plaintiff on July 3,
" 1893, and that plaintiff ever since has been and now is the
" owner thereof."

Defendant based its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer quartz mine and the facts, matters and things therein recited, upon the following grounds, to wit:

" (a) All and singular each and every the facts so objected
" to, including all and singular each and every the said patent
" to said Pioneer quartz mine, Lot No. 48, and the facts, mat-
" ters and things therein recited and set forth, are immaterial
" and irrevelant to all and singular each and every the issues
" in this cause, and are incompetent as evidence to prove the
" issues herein or any of them and are incompetent as evidence
" to prove title or right in plaintiff to the ores in dispute in this
" cause, because: Although it is true that the ores in dispute
" herein were all extracted by defendant from the vein men-
" tioned in the complaint herein and in said agreed statement
" and in said Pioneer patent as the ' Pioneer vein ', and that

"the apex of said Pioneer vein extends from the center of the "south end line of said Lot No. 48 through said lot north nine- "teen (19) degrees and fourteen (14) minutes west to the "center of the north end line thereof, and that all of said dis- "puted ores were extracted by defendant from points between "vertical planes drawn down through the end lines of said "Lot No. 48 indefinitely extended in their own directions "respectively,—it is also true that, as shown by the facts set "forth in paragraph XXIII of said agreed statement and by "reference to 'Exhibit A' referred to in said paragraph "XXIII and attached to said agreed statement, all of said "disputed ores were extracted by defendant from points on "the dip of said vein more than 1,300 feet vertically below the "surface of the earth and outside of and distant more than "900 feet easterly from the vertical boundaries of said Lot "No. 48, to wit, more than 900 feet easterly from a vertical "plane drawn down through the easterly side line of said "Lot No. 48, and it is also true that, as shown by said Pioneer "patent and by the complaint herein and by reference to said "'Exhibit A', the end lines of said Pioneer quartz mine, Lot "No. 48, are not parallel to each other but, on the contrary, "the northern end line thereof in its course from its west end "easterly diverges and departs substantially and at a very "large angle toward the north from a line parallel to the "southern end line thereof, such divergence and departure "being to the extent of fourteen (14) degrees and forty-five (45) "minutes, the course of said southern end line from its west "end easterly being north eighty-nine (89) degrees and thirty- "six (36) minutes east and the course of said northern end "line from its west end easterly being north seventy-four (74) "degrees and fifty-one (51) minutes east, and it is also true "that, as shown by the facts set forth in paragraphs XX, "XXII, XXIII, XXIV and XXV of said agreed statement, "said Pioneer vein dips and extends downward into the earth "at such an angle from the plane of the horizon and in such a "manner as to pass from and extend out of said Pioneer "quartz mine easterly through and beyond the vertical east "side line thereof into ground lying easterly from said Lot No. "48 and from said vertical east side line thereof and so onward "continuously in the direction of the aforesaid divergence "between said end lines of said Lot No. 48 to the points above "described where defendant extracted from said vein the ores

" in dispute herein, all of which points are within the vertical " boundaries of defendant's Silva quartz mine, Lot No. 86, and " it is also true that, as shown by said Pioneer patent, the " same was issued on the twelfth day of August, 1872, under " the provisions of that certain act of the Congress of the " United States approved May 10, 1872, entitled 'An act to pro- " 'mote the development of the mining resources of the United " 'States', and more than three months after said act of Con- " gress became a law, and it is also true that, under the provi- " sions of said act of Congress and particularly under the pro- " visions of sections two (2) and three (3) thereof, it was at the " time of the issuance of said Pioneer patent, ever since has " been and now is, necessary that the end lines of said Pioneer " quartz mine, Lot No. 48, should be parallel to each other in " order that any extralateral right or any right to or interest " in any part of said Pioneer vein lying outside the vertical " boundaries of said Lot No. 48 should or could attach to said " Lot No. 48 and be enjoyed by the owners thereof; and there- " fore and because the end lines of said Pioneer quartz mine " are not parallel to each other but diverge and depart from " each other in the direction of the dip of said Pioneer vein " and in the manner aforesaid, it was not competent to the " officers of the Land Department of the United States to make " a grant in connection with the grant of said Pioneer quartz " mine, Lot No. 48, of any extralateral right or any right to, " or interest in any part of said Pioneer vein lying outside the " vertical boundaries of said Lot No. 48, and therefore the act " of the officers of the Land Department of the United States " in granting or attempting to grant an extralateral right in " and by means of said Pioneer patent, was and is against law " and was and is absolutely void; and

" (b) All the ores in dispute in this cause were extracted " by defendant from said Pioneer vein at points within the ver- " tical boundaries of defendant's Silva quartz mine, Lot No. " 86, and distant more than 900 feet from the vertical bounda- " ries of said Pioneer quartz mine, Lot No. 48, and defendant " specially sets up and claims that, because of the fact that, " as shown by said Pioneer patent, the end lines of said Pio- " neer quartz mine, Lot No. 48, are not parallel to each other, " and because of the further fact that said end lines diverge " and depart from each other in the direction of the dip of " said Pioneer vein, such divergence and departure being to

"the extent of fourteen (14) degrees and forty-five (45) min-
"utes, so that in order to reach said points where said ores
"were extracted, it is necessary to follow said Pioneer vein on
"its dip away from said Lot No. 48 and in the direction of
"said divergence to points distant more than nine hundred
"feet from said Lot No. 48—therefore and because of the pro-
"visions of the act of the Congress of the United States,
"approved May 10, 1872, entitled 'An act to promote the
"'development of the mining resources of the United States,'
"under which said Pioneer patent was issued and especially
"because of the provisions of sections two (2) and three (3)
"of said act, the owners of said Pioneer quartz mine, Lot No.
"48, are not now and never have been the owners of or entitled
"to the possession of any part of said Pioneer vein which
"lies outside of the vertical boundaries of said Pioneer quartz
"mine, Lot No. 48, as described in said United States patent
"therefor, and are not now and never have been the owners of
"or entitled to the possession of the ores in dispute in this
"cause or any thereof; and

"(c) All the ores in dispute herein were extracted by de-
"fendant from points without the vertical boundaries of said
"Pioneer quartz mine, Lot No. 48, and by reason of the surface
"form or shape of said Pioneer quartz mine, Lot No. 48, its
"owners never have had and have not now any right under
"any law of the United States or under any law to follow said
"Pioneer vein in its downward course beyond the lines of said
"Pioneer quartz mine, Lot No. 48; and

"(d) The grant or attempted grant of an extralateral
"right in and by said Pioneer patent is indefinite and uncer-
"tain in this, said patent purports to grant only 1,589.94
"linear feet of said Pioneer vein throughout its entire depth,
"and by the conditions of said patent the interest in said
"Pioneer vein thereby granted, or attempted to be granted,
"is specifically restricted to 1,589.94 linear feet thereof, but it
"cannot be ascertained from said Pioneer patent what par-
"ticular segment of 1,589.94 linear feet of said Pioneer vein is
"intended to be granted thereby, nor can it be ascertained
"from said Pioneer patent whether it is intended thereby to
"grant that certain segment of 1,589.94 linear feet of said
"Pioneer vein lying parallel to and next northerly from the
"south end line of said Pioneer quartz mine extended in its
"own course easterly, or whether it is intended by said Pio-

"neer patent to grant that certain segment of 1,589.94 linear "feet of said Pioneer vein lying parallel to and next southerly "from the north end line of said Pioneer quartz mine "extended in its own course easterly, or whether it is intended "by said Pioneer patent to grant a segment of 1,589.94 linear "feet of said Pioneer vein midway between said end lines of "said Pioneer quartz mine indefinitely extended in their own "directions respectively, so that, even though the grant of "1,589.94 linear feet of said Pioneer vein mentioned in said "Pioneer patent were valid, it cannot be ascertained in any "way or manner from said Pioneer patent whether or not the "ores in dispute in this cause ever formed part of that partic- "ular segment of the Pioneer vein intended to be conveyed by "said patent to the Pioneer Gold and Silver Mining Company; "and

"(e) If said Pioneer patent can be construed as defining "and conveying any interest at all in any part of said Pioneer "vein lying outside of said Lot No. 48, such interest so defined "and conveyed must be either (1) that certain segment of "1,589.94 linear feet of said vein lying parallel to and next "northerly from the south end line of said Lot No. 48 extended "in its own course easterly, because, as is shown by said "Pioneer patent, and by the complaint herein, said south end "line of said Lot No. 48 constitutes the base line and initial "boundary thereof, from which all its other boundaries must "be measured, or (2) that certain triangular segment of said "vein having for its north boundary, a line drawn from the "centre of the north end line of said Lot No. 48, to wit, from "the north end of said vein, parallel to the south end line "of said Lot No. 48 extended in its own course north eighty- "nine (89) degrees and thirty-six (36) minutes east, and for "its south boundary, a line drawn from the center of the "south end line of said Lot No. 48, to wit, from the south end "of said vein parallel to the north end line of said Lot No. "48 extended in its own course north seventy-four (74) degrees "and fifty-one (51) minutes east because said triangular seg- "ment of said vein includes the only portion of said vein out- "side of said Lot No. 48, which is definable by reference "to the boundaries of said Lot No. 48, so that in no case can it "be shown that the disputed ores ever constituted part of "any vein segment conveyed by means of said Pioneer "patent."

Said 22nd objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 18.

The ruling of the Superior Court upon said objection (exception No. 18) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 93 to 96.

Assignment of error No. 19. At said trial, the defendant specifically set forth, made and claimed its objection to the admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-third. All and singular each and every the facts "set forth in paragraph XXIII of said agreed statement, "showing among other matters and things, that defendant "has extended its 1,450, 1,550, 1,650 and 1,750 levels south of "a vertical plane drawn down through the north end line of "said Lot No. 48 extended indefinitely in its own direction "north seventy-four (74) degrees and fifty-one (51) minutes "east, and that between October 8, 1895, and December 12, "1895, this defendant extracted 2,604 tons of ore from said "Pioneer vein southerly from said vertical plane but within "the vertical boundaries of said Silva quartz mine, and that "the gross value of said 2,604 tons of ore was $62,218.45, and "that the aggregate cost of mining and milling said 2,604 tons "of ore was $6,119.40, and that the net profit realized by "defendant from said 2,604 tons of ore was $56,099.95;"

which said objection was overruled by the court, to which the defendant did duly except, and made the same of record as the defendant's exception No. (19).

The ruling of the Superior Court upon said objection (exception No. 19) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 96 and 97.

Assignment of error No. 20. At said trial the defendant specifically set forth, made and claimed its objection to the

admission or consideration by the court as evidence or as possessing probative force herein, of—

"Twenty-fourth. All and singular each and every the facts "set forth in paragraph XXIV of said agreed statement, in "so far as such facts show or tend to show that the aforesaid "2,604 tons of ore were extracted from said Pioneer vein south "of said vertical plane drawn down through the line named "in said paragraph XXIV as the line A—B—B¹."

Defendant based its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to wit:

"(a) All and singular each and every the facts so objected "to are immaterial and irrelevant to all and singular "each and every the issues in this cause and are incompetent "as evidence to prove the issues herein or any of them, "because: Although it is true that all of said ores were "extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed "statement as the Pioneer vein, and that the apex of said "Pioneer vein extends from the center of the south end line "of said Lot No. 48 throughout the entire length of said lot "and midway between the side lines thereof to the center of "the north end line thereof, and that all of said ores were "extracted by defendant from points between vertical planes "drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—it is "also true that, as shown by the facts set forth in paragraph "XXIII of said agreed statement and by reference to 'Exhibit "A' referred to in said paragraph XXIII and attached to said "agreed statement, all of said ores were extracted by "defendant from points on the dip of said vein more than "1,300 feet vertically below the surface of the earth, and "outside of and distant more than 900 feet easterly from the "vertical boundaries of said Lot No. 48, to wit, more than "900 feet easterly from a vertical plane drawn down through "the easterly side line of said Lot No. 48, and it is also true "that, as shown by said Pioneer patent and by the complaint "herein and by reference to said 'Exhibit A', the end lines "of said Pioneer quartz mine, Lot No. 48, are not parallel to "each other, but, on the contrary, the northern end line "thereof in its course from its west end easterly diverges and

"departs substantially and at a very large angle, toward the "north from a line parallel to the southern end line thereof, "such divergence and departure being to the extent of four- "teen (14) degrees and forty-five (45) minutes, the course of "said southern end line from its west end easterly being north "eighty-nine (89) degrees and thirty-six (36) minutes east, and "the course of said northern end line from its west end east- "erly being north seventy-four (74) degrees and fifty-one (51) "minutes east, and it is also true that as shown by the facts "set forth in paragraphs XX, XXII, XXIII, XXIV and XXV "of said agreed statement, said Pioneer vein dips and extends "downward into the earth at such an angle from the plane of "the horizon and in such a manner as to pass from and extend "out of said Pioneer quartz mine easterly through and beyond "the vertical east side line thereof into ground lying easterly "from said Lot No. 48 and from said east vertical side line "thereof and so onward continuously in the direction of the "aforesaid divergence between said end lines of said Lot No. "48 to the points above described where defendant extracted "said ores from said vein, all of which points are within the "vertical boundaries of defendant's Silva quartz mine, Lot "No. 86, and it is also true that, as shown by reference to said "paragraph XXIII and to said 'Exhibit A', all of said ores "were extracted outside of and far easterly from said Lot "No. 48 and at points where vertical planes drawn down "through the end lines of said Lot No. 48 extended in their "own directions respectively, are distant from each other more "than 1,900 feet, and it is also true that, as shown by said Pio- "neer patent, the same was issued on the twelfth day of "August, 1872, under the provisions of that certain act of the "Congress of the United States approved May 10, 1872, entitled "'An act to promote the development of the mining resources "'of the United States', and more than three months after "said act of Congress became a law, and it is also true that, "under the provisions of said act of Congress and particularly "under the provisions of sections two (2) and three (3) thereof, "it was at the time of the issuance of said Pioneer patent, "ever since has been and now is, necessary that the end lines "of said Pioneer quartz mine, Lot No. 48, should be parallel "to each other in order that any extralateral right or any "right to or interest in any part of said Pioneer vein lying "outside the vertical boundaries of said Lot No. 48, should or

"could attach to said Pioneer quartz mine, and be enjoyed "by the owners thereof; and therefore and because the end "lines of said Pioneer quartz mine are not parallel to each "other but diverge and depart from each other in the direc- "tion of the dip of the Pioneer vein and in the manner afore- "said, it was not competent to the officers of the Land "Department of the United States to make a grant in connec- "tion with the grant of said Pioneer quartz mine, Lot No. 48, "of any extralateral right or any right to or interest in any "part of said Pioneer vein, lying outside the vertical bounda- "ries of said Lot No. 48, and therefore the act of the officers "of the Land Department of the United States in granting "or attempting to grant an extralateral right in and by "means of said Pioneer patent, was and is against law and "was and is absolutely void; and therefore said ores did not "pass to the Pioneer Gold and Silver Mining Company by "means of said Pioneer patent, and therefore did not pass "to plaintiff herein by means of the deed whereby said Pio- "neer Gold and Silver Mining Company conveyed said "Pioneer quartz mine to said plaintiff; and

"(b) All of said 2,604 tons of ore were extracted by defend- "ant from the vein of which said Pioneer vein forms a part at "points distant more than 900 feet from said Lot No. 48 and "within the vertical boundaries of defendant's Silva quartz "mine, Lot No. 86, which was granted to this defendant on "the sixth day of February, 1893, by letters patent of the "United States issued in pursuance of the provisions of "chapter six of title thirty-two of the Revised Statutes of the "United States, and legislation supplemental thereto, and "*defendant specially sets up and claims that under the aforesaid* "*statutes and legislation* of the United States, this defendant "at all the times mentioned in said complaint has had and "now has against all the world the exclusive title and right "to all and singular each and every the aforesaid 2,604 tons "of ore and to all and singular each and every the substance "contained within the vertical boundaries of said Lot No. 86, "and defendant further under said statutes and legislation of "the United States specially sets up and claims immunity "from any and all claims of said plaintiff to said 2,604 tons "of ore or any thereof and from any and all claims of said "plaintiff to the substance contained within the vertical "boundaries of said Lot No. 86 or any thereof and defendant

"further *specially sets up and claims immunity from and against* "*the claims of plaintiff to said 2,604 tons of ore and to the sub-* "*stance contained within the vertical boundaries of said lot No. 86,* "*because of the fact that, as shown by said Pioneer patent, the end* "*lines of said Pioneer quartz mine, lot No. 48, are not parallel to* "*each other, and because of the further fact that said end lines* "*diverge and depart from each other in the direction of the dip of* "*said Pioneer vein, such divergence and departure being to the extent* "*of fourteen (14) degrees and forty-five (45) minutes,* so that in "order to reach said points where said ores were extracted, "it is necessary to follow said Pioneer vein on its dip away "from said Lot No. 48 and in the direction of said divergence "to points distant more than nine hundred feet from said Lot "No. 48. *Therefore* and because of the provisions of the act of "the Congress of the United States, approved May 10, 1872, "entitled 'An Act to promote the development of the mining "resources of the United States', under which the U. S. patent "to said Lot No. 48 was issued, and especially because of the "provisions of section two (2) and three (3) of said act, the "owners of said Pioneer quartz mine, Lot No. 48, are not now "and never have been the owners of or entitled to the posses-"sion of said 2,604 tons of ore or any thereof, and are not now "and never have been the owners of or entitled to the posses-"sion of the substance contained within the vertical bound-"aries of said Lot No. 86, or any thereof; and

"(c) All the ores in dispute herein were extracted by de-"fendant from points without the vertical boundaries of said "Pioneer quartz mine, Lot No. 48, and by reason of the surface "form or shape of said Pioneer quartz mine, Lot No. 48, its "owners never have had and have not now any right under "any law of the United States or under any law to follow said "Pioneer vein in its downward course beyond the lines of said "Pioneer quartz mine, Lot No. 48; and

"(d) The averment in the complaint herein of an extra-"lateral right is indefinite and uncertain in this, said com-"plaint alleges the ownership of plaintiff in and to 1,589.94 "linear feet of said Pioneer vein with the exclusive right to "said 1,589.94 linear feet of said vein throughout its entire "depth, although it may enter the land adjoining, but it is not "alleged in said complaint that plaintiff has or ever had any "interest in said Pioneer vein excepting said 1,589.94 linear "feet thereof throughout their entire depth as aforesaid, and "it cannot be ascertained from said complaint what particular

"1,589.94 linear feet of said Pioneer vein is intended to be "claimed by plaintiff, nor can it be ascertained from said com- "plaint whether it is the intention of plaintiff to claim that "certain segment of 1,589.94 linear feet of said Pioneer vein "lying parallel with and next northerly from the south end "line of said Lot No. 48 extended in its own course easterly, "or whether it is intended by said complaint to claim that cer- "tain segment of 1,589.94 linear feet of said Pioneer vein lying "parallel to and next southerly from the north end line of said "Lot No. 48 extended in its own course easterly, or whether "it is intended by said complaint to claim a segment of "1,589.94 linear feet of said Pioneer vein midway between said "end lines of said Pioneer quartz mine indefinitely extended "in their own directions respectively, so that it cannot be "ascertained in any way or manner from said complaint "whether or not the ores in dispute in this cause ever formed "part of that particular segment of the Pioneer vein claimed "by plaintiff in its said complaint; and

"(e) If said complaint can be construed as defining any "claim at all of plaintiff to any part of said Pioneer vein lying "outside of said Lot No. 48, such part so defined must be either "(1) that certain segment of 1,589.94 linear feet of said vein "lying parallel to and next northerly from the south end line "of said Lot No. 48 extended in its own course easterly, be- "cause, as is shown by said complaint, said south end line of "said Lot No. 48 constitutes the base line and initial boundary "thereof, from which all its other boundaries must be meas- "ured, or (2) that certain triangular segment of said vein "having for its north boundary, a line drawn from the center "of the north end line of said Lot No. 48, to wit, from the "north end of said vein, parallel to the south end line of said "Lot No. 48 extended in its own course north eighty-nine (89) "degrees and thirty-six (36) minutes east, and for its south "boundary, a line drawn from the center of the south end line "of said Lot No. 48 to wit, from the south end of said vein, "parallel to the north end line of said Lot No. 48 extended in "its own course north seventy-four (74) degrees and fifty-one "(51) minutes east, because said triangular segment of said "vein includes the only portion of said vein outside of said Lot "No. 48 which is definable by reference to the boundaries of "said Lot No. 48 as set out in said complaint so that in no

"case can it be shown that the disputed ores ever constituted "part of any vein segment described in said complaint."
which said objection was overruled by the court, to which ruling the defendant did duly except, and made the same of record as the defendant's exception No. 20.

The ruling of the Superior Court upon said objection (exception No. 22) and the affirmance of such ruling by the Supreme Court of the State of California are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 97 to 101.

Assignment of error No. 21. The defendant also excepted to that part of the decision of the Court expressed in its conclusion of law No. 1, as follows:

"That the plaintiff, Argonaut Mining Company, is and at "all times mentioned in the complaint was the owner of all "that portion of the Pioneer or Argonaut vein lying between "vertical planes drawn downward through the end lines of "said Pioneer or Argonaut mine, lot number 48, and said "end lines produced in their own direction indefinitely east- "wardly, and at all times mentioned in the complaint in this "action said plaintiff had and now has a right to pursue "and follow said vein on its downward course to any depth "underneath the surface of the Silva quartz mine owned by "defendant, within said vertical planes, although in its down- "ward course said vein passes out of and beyond a vertical "plane drawn downward through the east side line of said "Pioneer or Argonaut mine;"
and made such exception of record herein as defendant's exception No. 21.

The ruling of the Superior Court upon said matter (exception No. 21) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 101.

Assignment of error No. 22. The defendant also excepted to that part of the decision of the court expressed in its conclusion of law No. 2, as follows:

"That the entry by said defendant upon said vein southerly "beyond the vertical plane drawn through the northerly end "line of said Pioneer or Argonaut mine, and the said end line "produced eastwardly and the extraction of ore therefrom "as set forth in said agreed statement of facts, was wrongful "and unlawful;"

and made such exception of record herein as defendant's exception No. 22.

The ruling of the Superior Court upon said matter (exception No. 22) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 101 and 102.

Assignment of error No. 23. The defendant also excepted to that part of the decision of the Court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of "this Court, as follows:

"(1) That plaintiff have and recover of and from the "defendant, Kennedy Mining and Milling Company, the sum "of fifty-six thousand and ninety-nine 95/100 (56,099.95) dol- "lars in gold, together with interest thereon from September "14th, 1898, at the rate of seven per cent. per annum, also "costs of suit;"

and made such exception of record herein as defendant's exception No. 23.

The ruling of the Superior Court upon said matter (exception No. 23) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 102.

Assignment of error No. 24. The defendant also excepted to that part of the decision of the Court expressed in its conclusion of law No. 3 as follows:

"That the plaintiff is entitled to judgment and decree of "this Court as follows:

"(2) That defendant be perpetually restrained and en-

"joined from entering in or upon any portion of said vein "which lies southerly beyond a vertical plane drawn through "the northerly end line of said Pioneer or Argonaut mine and "said end line extended in its own direction eastwardly and "from extracting or removing from any portion of said vein "so lying southerly beyond said vertical plane, any ore, rock "or other material, and from running or causing to be run "or extended thereon any drifts, levels, stopes or mining "works of any kind;"

and made such exception of record herein as defendant's exception No. 24.

The ruling of the Superior Court upon said matter (exception No. 24) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 102.

Assignment of error No. 25. Defendant also excepted to that part of the judgment rendered herein, as follows:

"It is now therefore hereby ordered, adjudged and decreed "that plaintiff do have and recover of and from defendant "the sum of fifty-eight thousand two hundred and thirty-seven "and 85/100 ($58, 237.85) dollars, together with costs of suit "taxed at $260;"

and made such exception of record as defendant's exception No. 25.

The ruling of the Superior Court upon said matter (exception No. 25) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, pages 102 and 103.

Assignment of error No. 26. Defendant also excepted to that part of the judgment herein as follows:

"It is further ordered, adjudged and decreed that the "defendant Kennedy Mining and Milling Company, its agents, "servants, attorneys, and employees be, and they are hereby "perpetually restrained from entering in or upon any portion

"of the Pioneer or Argonaut vein lying between vertical "planes drawn downward through the end lines of said Pio- "neer or Argonaut mine, Lot No. 48, and said end lines pro- "duced in their own directions indefinitely eastwardly, and "from extracting or removing from any portion of said vein "so lying between said vertical planes, any ore, rock or other "material, and from running or causing to be run or extended "on said vein any drifts, levels, stopes or mining works of any "kind between said vertical planes, said end lines being "those two certain lines described respectively as follows, "to wit: The north end line, being that certain boundary of "said lot number 48 beginning at the northwest corner of said "lot and running north seventy-four (74) degrees fifty-one (51) "minutes east along the northerly end thereof, and the south "end line being that certain boundary of said lot beginning "at the southwest corner thereof and running north eighty- "nine (89) degrees thirty-six (36) minutes east along the "southerly end thereof;"

and made such exception of record herein as defendant's exception No. 26. (Erroneously cited in Record as exception No. 27.)

The ruling of the Superior Court upon said matter (exception No. 26) and the affirmance of such ruling by the Supreme Court of the State of California, are designated as an assignment of error upon which plaintiff in error will rely for a reversal of the decision and judgment herein.

Record, page 103.

V.

BRIEF OF THE ARGUMENT.

The points of law to be discussed in this case, as disclosed in that part of this brief in which the questions involved are set out, invoke from this court the construction and application of the mining laws of the United States, generally known as the Mining Statute of July 26, 1866, Vol. 14 U. S. Stats. at Large, p. 251; and the later act entitled "An act to promote "the development of the mining resources of the United "States", approved May 10, 1872, Vol. 17 U. S. Stats. at Large, p. 91. U. S. Rev. Stats., Sections 2318 to 2352.

In construing these statutes, it is essential that we keep in view the antecedent "Rules of the Miners" and the legal evolution of the doctrines of the "extralateral right", as the same have grown in the history of mining on the public domain, written and preserved in the decisions of the Courts and in reports of government officials.

It will be seen that until the enactment of the law of May 10, 1872, both the miners' rules and the act of Congress of July 26, 1866, were vague and uncertain in defining the extralateral right. They appear merely as rules of *first impression* and experiment.

The most complete and authentic collection of these local rules existing prior to the enactment of the act of Congress first above referred to, is that contained in the report to the Secretary of the Treasury, made by J. Ross Browne, Special Commissioner of the United States, and published by the Government in 1867.

J. Ross Browne's Report, 1867, pages 235-249.

An examination of these local rules, and of the State and Territorial statutes, shows that the extralateral right was not defined in any of the districts, nor recognized at all in the greater part of the mining territory of the West.

Under the statutes of Idaho, Oregon, Nevada and Arizona, no extralateral right was recognized.

See Browne's Report, pages 242 as to Nevada, 247 as to Oregon, 248 as to Idaho, and 249 as to Arizona.

California had no statute on the subject, and some of the district rules recognized the right while others did not.

The following were the districts recognizing such right in the terms stated, respectively.

Quartz regulation of Nevada County, California:

"Art. 2. Each proprietor of a quartz claim shall hereafter "be entitled to one hundred feet on a quartz ledge or vein, and "the discoverer shall be allowed one hundred feet additional.

"Each claim shall include all the dips, angles and varia-"tions of the vein."

Browne's Report, page 235.

Sacramento County, California:

"Art. 2. Each proprietor of a quartz claim shall hereafter "be entitled to two hundred feet of a quartz ledge or vein and "the discoverer shall be allowed two hundred feet additional. "*Each claim shall include all the dips, angles and variations of "the vein.*"

Browne's Report, page 237.

In Nevada, prior to the enactment of State Law, the Virginia District had this rule:

"Art. 1. All quartz claims hereafter located shall be two "hundred feet on the lead, including all dips and angles."

Browne's Report, page 245.

Reese River District:

"Claims were two hundred feet on the lead, with all dips, "spurs and angles, off-shoots, out-crops, depths, widths, varia- "tions and all the minerals and values therein contained, but "this by another rule was limited to one hundred feet on each "side of the ledge, and excluded parallel ledges in same area."

Browne's Report, page 247.

In California districts that did not recognize any extra-lateral right, we find the following rules.

Sierra County, California:

"Art. 1. A claim on any quartz ledge in this county may "have a length of two hundred feet along the same, and a "width of two hundred and fifty feet at *right angles* with the "ledge, on each side of the same to include all quartz found "within the above mentioned limits."

Browne's Report, page 236.

Tuolumne County, California:

"Art. 2. Each proprietor or locator of a quartz claim shall "be entitled to one hundred and fifty feet in length of the vein, "including all its dips and angles; also one hundred and fifty "feet on each side of said vein, together with the right of way "on either side of said vein to run tunnels and drifts any dis- "tance that may be necessary in order to work said vein; pro- "vided that the right to one hundred and fifty feet herein

"granted on each side of the vein, shall not be deemed to con-
"flict with or detract from the right of any subsequent locator
"who may discover a vein *outside* of said one hundred and fifty
"feet to follow his vein through said ground."

Browne's Report, page 237.

Copperopolis (Calaveras County, California) District:
"Art. 3. A miner shall be entitled to one claim by location
"on a lead of one hundred and fifty feet in length and three
"hundred feet in width" * * *

(No "dip" mentioned.)

Browne's Report, page 242.

The foregoing provisions of statutes and local rules relating to the "extralateral right", as it was recognized or ignored in the mining country of the western States and Territories, are sufficient to indicate the utter confusion upon the question which existed at the time of the enactment of the law of Congress of July 26, 1866.

The condition which Congress found to exist in 1866, is well described by Special Commissioner Browne in his report, in this language:

"There are not less than five hundred mining districts in
"California, two hundred in Nevada, and one hundred each in
"Arizona, Idaho and Oregon, each with its set of written
"regulations. * * * The regulations in the different
"districts are so various, however, that it is impossible to
"reduce them to a few classes comprehending all their pro-
"visions."

Browne's Report, pages 226-7.

He quoted from a report of the Senate Committee of the Nevada Legislature of February 23, 1866, as follows:

"As to uniformity, there is nothing approaching it. There
"never was confusion worse confounded. More than two
"hundred petty districts within the limits of a single state,
"each with its self-approved code, these codes differing not
"alone each from the other, but presenting numberless
"instances of contradictions in themselves."

Browne's Report, page 227.

The miners' rules under consideration by Justice Field in the Eureka case (4th Sawyer, 302) were those only of the Eureka District, which provided expressly that "each locator "should be entitled to all the dips, spurs and angles connect- "ing with his ledge", and the language of that learned Judge in that case related to such district rule and not to the rule in the districts of the West generally, as is erroneously asserted in Lindley on Mines, Sec. 43.

As has been shown herein, the rules of the districts and States and Territories of the West, were generally adverse to the existence of the extralateral right, and whenever such right was allowed, it formed an exception.

From this we deduce the proposition, that the act of Congress of July 26, 1866, in so far as it concerns the extralateral right *as therein expressed*, is not the assertion of a pre-existing right, well defined and understood, but on the contrary it was a first attempt to systematize a mass of vague, uncertain and experimental rules. By the terms of the 5th Section of the act, the matter remained subject to the power of Congress to enact any legislation necessary to provide means for the complete development of the mineral on the public domain, and the right of revision by the Congress was always expressed in the patents issued under the statute.

Of the miners' rules only one was of universal application, and that was the rule that the locator or owner of the claim could have no greater length *beneath the surface* than the length acquired by him upon the surface.

This has been the rule *everywhere and at all times*, as is clearly stated in the Eureka case, p. 322, as follows:

"It is true that *end lines* are not in terms named in the "rules of the miners, but they are necessarily implied, and "no reasonable construction can be given to them without "such implication. What the miners meant by allowing "a certain number of feet on a ledge was that each locator "might follow his vein for that distance on the course of the "ledge, *and to any depth within that* distance. So much of the "ledge he was permitted to hold as lay within vertical planes "drawn down *through the end lines* of his location, and could "be measured anywhere by the feet on the surface. If this "were not so, he might by the bend of his vein hold under "the surface along the course of the ledge double and treble "the amount he could take on the surface. Indeed, instead

"of being limited by the number of feet prescribed by the "rules, he might in some cases oust all his neighbors and take "the whole ledge. No construction is permissible which "would substantially defeat the limitation of quantity on a "ledge, which was the most important provision in the whole "system of rules.

"Similar rules have been adopted in numerous mining "districts and the construction thus given has been uniformly "and everywhere followed. We are confident that no other "construction has ever been adopted in any mining district "in California or Nevada. And the construction is one which "the law would require in the absence of any construction by "miners. If, for instance, the State were to-day to deed a "block in the City of San Francisco to twenty persons, each "to take twenty feet front, in a certain specified succession, "each would have assigned to him by the law a section "*parallel with that of his neighbor of twenty feet in width, cut* "*through the block. No other mode of division would carry out* "*the grant.*"

It follows as a physical fact that under the rules of the miners the planes between which a vein may be followed on its dip by the owner, must be *parallel planes* and that none other can or will preserve the *limitation of length upon the vein.*

As to the *direction* of these *parallel planes*, none of the miners' rules spoke. Neither did the rules of the miners in all instances expressly require that a location should include surface ground, though many of them did so require.

The Supreme Court of California had held that:

"The main thing was *the vein*: this it was that was intended "to be taken up, and the exact direction could not, of course, "be ascertained or accurately described until the vein was "followed up or explored."

Johnson v. Parks, 10 Cal., 449.

The same principle was announced by the Supreme Court of Nevada in an action of ejectment describing a sub-surface vein as the premises sought to be recovered.

Bullion M. Co. v. Croesus M. Co., 2 Nev., 168.

Prior to 1866 and while the "Miners' Rules" stood alone and unsanctioned by act of Congress, there was no reported

case in which the doctrine of following the vein upon its dip was involved, and up to the time when the act of July 26, 1866, was brought before the Committees of Congress, the report of Commissioner Browne had not been made, and hence the Congress had but little light on the subject before passing the act.

The condition of the mining law in the United States at this time is well described in the preface to Gregory Yale's work on "Mining Claims and Water Rights", dated October 14, 1867, in which this language appears:

"In our jurisprudence, until recently, there is a sad defi-
"ciency of attempts to elucidate the principles governing the
"law of mining property. In the old States, where mining
"property was held under the same tenure as other real
"estate, and where the Federal Government owned no land,
"and the subject of mineral lands attracted but little atten-
"tion, as distinct from other lands, the decisions of the Courts
"are neither frequent nor peculiar.

"In the Federal Courts there has been no important deci-
"sion in a mining case, except the one of California origin,
"involving the construction of the mining ordinances of
"Mexico, and no other case on those ordinances is likely to
"be presented. With this exception, and one or two cases
"arising under the leasing system, with one case from
"Nevada, the Federal tribunals furnish nothing for our
"guide."

In the introductory remarks prefacing Halleck's translation of De Fooz, the same view is taken (in 1860), namely:

"The law of mines, as a special branch of jurisprudence,
"has received heretofore very little attention in the United
"States, either from legislators or from members of the legal
"profession. While every other civilized country, with a few
"unimportant exceptions, has had its mining code or mining
"laws, defining and regulating the rights of the State and of
"individuals in this species of property, our own legislators
"have virtually ignored the whole subject, leaving the Courts
"to apply to the few cases which have arisen, the English
"laws and decisions of English Courts. And even these laws
"and decisions have not always been correctly understood or
"properly applied."

Without burdening this brief with extensive citations of authorities in detail as to the legislative history of the law of

the 26th of July, 1866, reference for that subject matter is made to the above named work of Gregory Yale, pages 325 to 348.

Out of this anomalous condition, out of a *system of trespasses upon the public domain*, was wrought by the Congress of the United States, at a time when it was overburdened with vital questions of reconstruction at the end of the great civil war, and by means of injecting a new subject into an act introduced for a different purpose and having a foreign title, the first Federal mining law of this country, and with respect to the principle here involved, unlike any mining system ever in force elsewhere in the civilized world.

The history of the bill shows that its friends saw the danger that threatened the mining industry of the Pacific Coast, in the claims that were being asserted boldly upon the floors of Congress that the *mines of the West should pay the national debt incurred in the suppression of the rebellion.*

In the face of this danger the delegation from the Pacific Coast was divided as to the proper course to be pursued to protect the mining industry.

Thus menaced from the East, which sought to unload the burden of the national debt upon the West, and hampered by the bickering among the membership of the western delegation, those who were in favor of the doctrine of freedom of exploration of all the public mineral lands, not only saw the necessity of taking what they could get, but of taking it *in any shape that would preserve the one principle of private ownership* by the first appropriator or *locator.*

Under the *impulse of this necessity* was born the law of *July 26, 1866.* Whatever may have been its faults, its crudities, its imperfections, it has the merit of being the entering wedge by means of which was established the principle of private ownership of mines as distinguished from the regalian doctrine, which up to that time had prevailed as to the mines of precious metals in this country as well as in civilized countries the world over, which regalian doctrine, according to the authorities upon the subject, *was then the existing law of the territory acquired by the United States from Mexico.*

Hence the proper definition or any definition of the extra-lateral right, as it has grown up since in our law, was a matter which might well at that time have been considered of minor importance, and so as well might be classed the matter

of limiting the surface ground, the direction of end lines, the crossing of ledges, the apex right, parallelism of end lines, and a multitude of other questions, all of which have gained an importance in the subsequent growth of the mining industry, which, at the time of the passage of the Act of 1866, were neither thought of nor provided for.

Recognizing the imminence of the danger that might lurk in the hastily constructed scheme of the Act of 1866, and the necessity for flexibility in the scheme, the Congress reserved in Sections 1 and 5 the power to make such changes, laws, regulations and amendments as to supply the additional means necessary to the complete development of the mineral resources of the country and made all titles acquired under the act, and patents issued, *express this reservation.*

Notwithstanding that the extralateral right as a principle of mining law, was an innovation upon and at variance from all other known systems, and notwithstanding its vagueness, defects and imperfections, as expressed, it was in accord with the prevailing notions and habits of the west, to claim all in sight and out of sight, and the people and the Courts received it with acclaim as being a just tribute paid by the Federal government to the deserving appropriator and miner.

The act of Congress now under consideration, in its very basic structure, deals with the *matter of disposition of the fee simple title to the mineral lands, surface by the acre*, as well as the *included vein*, at a price *per acre* of *surface*, thus in the inception of a general mining law, making a radical departure from the system of the "miners' rules."

In every step provided in the act for the acquisition of title from the government, the "exploration", the "occupation", the "diagram" accompanying application, the "entry" of such "tract", the "patent" and "payment" are all of "*land*", *superficial area of the earth's surface;* excluding and excepting all veins except the one claimed.

Sections 1 to 4 of Act of 1866.

Before the enactment of this Federal law the few adjudged cases were necessarily of State of Territorial cognizance; but upon its passage at once was begun the judicial working out by the Federal Courts of the pregnant questions arising under the law, resulting finally in the establishment of the principles

controlling and limiting the rights of the miner, (a) in his ownership beneath the surface by his rights as required and limited upon the surface, (b) as to length upon the vein, and (c) as to surface ground on each side of the vein as well as to surface form. This result has been brought about partly by judicial and partly by legislative action.

Under the act of Congress of 1866, no reported case involving the extralateral right was decided by the Federal Courts that anywise directed public attention to the imperfections of that act, or that can be said to be reflected in that *revision of the mining law* of the United States that was accomplished by the act of Congress of date May 10, 1872, entitled "An "act to promote the development of the mining resources of "the United States"; and from this follows the fact, that instead of judicial construction of the act of July 26, 1866, throwing light upon the subject, for the guidance of Congress, quite the reverse was the case, namely, the revisory act of May 10, 1872, reflected light which enabled the Courts to construe the two, the crude, primitive act of 1866 in the light of the perfected system inaugurated by the act of May 10, 1872.

This will be made clearly manifest as we review, further on, the adjudications germane to the questions here involved.

It may prove of assistance to the Court to present the salient features of the first act side by side with the correlative provisions of the second or revisory act, in so far as such provisions are material in this case.

Mining Statute of July 26, 1866.

Chapt. CCLXII.

AN ACT GRANTING THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND FOR OTHER PURPOSES:

(Usual enacting clause)—"That the mineral lands of the "public domain, both surveyed and unsurveyed, are hereby "declared to be free and open to exploration and occupation, "by all citizens of the United States, and those who have "declared their intention to become citizens, subject to such "regulations as may be prescribed by law, and subject also "to the local customs or rules of miners in the several mining "districts, so far as the same may not be in conflict with the "laws of the United States."

Mining Statute of May 10, 1872.

AN ACT TO PROMOTE THE DEVELOPMENT OF THE MINING RESOURCES OF THE UNITED STATES.

(Usual enacting clause)—"That all valuable mineral "deposits in land belonging to the United States, both sur- "veyed and unsurveyed, are hereby declared to be free and "open to exploration and purchase, and the lands in which "they are found to occupation and purchase, by citizens of "the United States, and those who have declared their inten- "tion to become such, under regulations prescribed by law, "and according to the local customs or rules of miners, in the "several mining districts, so far as the same are applicable "and not inconsistent with the laws of the United States."

Note.—The only material change made by the later statute is that the *lands* containing valuable mineral deposits are *open* to *exploration and purchase*.

SEC. 2—ACT OF 1866.

"That whenever any person or association of persons claims "a vein or lode of quartz or other rock in place, bearing gold, "silver, cinnabar, or copper, having previously occupied and "improved the same according to the local customs or rules "of miners in the district where the same is situated, and "having expended in actual labor and improvements thereon, "an amount of not less than one thousand dollars, and in "regard to whose possession there is no controversy or oppos- "ing claim, it shall and may be lawful for said claimant, or "association of claimants, to file in the local land office, a "diagram of the same, so extended laterally or otherwise, as "to conform to the local laws, customs, and rules of miners, "and to *enter such tract* and receive a *patent therefor*, granting "such mine, together with the right to follow such vein or "lode, with its dips, angles and variations, to any depth, "although it may enter the land adjoining, which land adjoin- "ing shall be sold subject to this condition:

"Sec. 3 * * * But said plat, survey or description shall "in no case cover more than one *vein or lode*, and no patent "shall issue for more than *one vein or lode*, which shall be "*expressed in the patent issued.*

"Sec 4. * * * Provided, that no location hereafter "made shall exceed two hundred feet in length along the

"vein for each locator, with an additional claim for discovery "to the discoverer of the lode, with the right to follow "such vein to any depth, with all its dips, variations and "angles, together with a reasonable quantity of surface, for "the convenient working of the same, as fixed by local rules; "and provided further, that no person may make more than "one location on the same lode, and not more than three "thousand feet shall be taken in any one claim by any asso- "ciation of persons."

The corresponding provisions of the act of May 10, 1872, are sections 2 and 3 of the later act.

Section 2 of said Act reads as follows:

"That mining claims upon veins or lodes of quartz or other "rock in place, bearing gold, silver, cinnabar, lead, tin, copper, "or other valuable deposits, heretofore located, shall be gov- "erned as to length along the vein or lode by the customs, "regulations and laws in force at the date of their location. "A mining claim located after the passage of this act, whether "located by one or more persons, may equal, but shall not "exceed, 1,500 feet in length along the vein or lode; but no "location of a mining claim shall be made until the discovery "of the vein or lode within the limits of the claim located.

"No claim shall extend more than three hundred feet on "each side of the middle of the vein at the surface, nor shall "any claim be limited by any mining regulation to less than "twenty-five feet on each side of the middle of the vein at the "surface, except where adverse rights existing at the passage "of this act, shall render such limitation necessary. The end "lines of each claim shall be parallel to each other."

Section 3 of said Act reads as follows:

"That the locators of all mining locations heretofore made, "or which shall hereafter be made, on any mineral vein, lode "or ledge, situated on the public domain, their heirs and "assigns, where no adverse claim exists at the passage of this "act *so long as they comply with the laws of the United States* and "the State, territorial and local regulations not in conflict "with said laws of the United States governing their posses- "sory title, shall have the exclusive right of possession and "enjoyment of all the surface included within the lines of "their locations and of all veins, lodes and ledges throughout "their entire depth, the top or apex of which lies inside of "such surface lines extended downward vertically, although

"such veins, lodes or ledges may so far depart from a perpen-
"dicular in their course downward as to extend outside the
"vertical side lines of such surface locations. Provided that
"their right of possession to such outside parts of such veins
"or ledges shall be confined to such portions thereof as lie
"between vertical planes drawn downward as aforesaid
"through the end lines of their locations, so continued in their
"own direction that such planes will intersect such exterior
"parts of said veins or ledges. And that provided further
"nothing in this section shall authorize the locator or pos-
"sessor of a vein or lode which extends in its downward course
"beyond the vertical lines of his claim to enter upon the sur-
"face of a claim owned or possessed by another."

Here must be noticed many radical changes in the mining law wrought by the Act of 1872, the chief among which are:

1. That claims theretofore located should be governed as to *length* by customs, regulations and laws in force at the date of their location; but by the following provision of the section *all* claims as to maximum and minimum *width* are governed by this section.

2. Limiting locations in length to one thousand five hundred feet.

3. Providing that no location shall be made until discovery of the vein or lode within the limits of the claim located.

4. Providing a maximum of three hundred and a minimum of twenty-five feet of *surface width* of a claim, measured from the middle of the vein *at the surface*.

5. The end lines of each claim shall be *parallel to each other*.

All these provisions by their express terms, except that as to length along the vein of claims located prior to May 10th, 1872, clearly apply to *all claims located before as well as after that date*.

In section three the following elements are new to the mining statute:

1. That the locators of all mining locations "heretofore "made or hereafter to be made * * * so long as they "comply with the laws of the United States * * * shall "have the *exclusive right* of possession and enjoyment" of (a) *all* the *surface* included within the lines of their locations (b) and of all veins, lodes and ledges throughout their entire depth (c) the top or apex of which lies inside of such surface lines (d) extended downward vertically (e) although such

veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations.

2. Then follows the proviso quoted in the third section defining the planes between which the exercise of the extra-lateral right is confined.

By section nine of the Act of May 10, 1872, a plan is provided for the engrafting of the new law upon the old in this wise:

"That sections one, two, three, four and six of an act "entitled 'An Act granting the right of way to ditch and "'canal owners over the public lands, and for other pur-"'poses', approved July 26th, 1866, are hereby repealed, but "such repeal shall not affect existing rights. Applications for "patents for mining claims now pending may be prosecuted "to a final decision in the General Land Office; *but in such "cases* where adverse rights *are not affected thereby, patents "may issue in pursuance of the provisions of this act.*"

This language clearly implies that if *adverse rights* were affected by such repeal, then the patent would issue under the law of 1866. In the case of the Pioneer application for a patent, which was then pending, no adverse rights were to be affected, and the applicant *elected to take patent under the provisions of the law of 1872, and thereby elected to have applied the restrictions and limitations of that act*, in consideration of the enlarged rights given under that act.

This right of election must not be confused with the enlargement given by the succeeding clause of section nine to patents *theretofore* issued under the act of 1866, for the reason that the claims so situated were out of the land office, not subject to amendment as to surveys, and not any longer subject to administration or correction in any way, so as to make them conform to the requirements of the new law. Not so the application for the Pioneer claim. Its survey could be amended, its lines could be reformed, its end lines, as in Doe vs. Waterloo, 54 Fed., 935, could be made parallel, since the patent did not issue until August 12, 1872, more than three months after the enactment of the law of May 10, 1872. Neither does the proviso in section 16 save the patent of the Pioneer claim from the effect of such *election*. It was not the *repeal of acts inconsistent* with the act of 1872 that took away the extralateral right of the Pioneer claim, if it ever had any,

but it was electing to take the *patent under the law of 1872 with its enlarged benefits, and the acceptance of such a patent, rather than to take its patent for one vein or ledge under the act of 1866.*

To make this position clearer by a different form of statement:

The words are, "but such repeal shall not affect existing rights". The existing rights *were to buy one vein* limited by the number of feet, etc., with *necessary* surface, under the act of 1866; or, if owner did not want a patent, to hold it indefinitely under the act of 1866; or such an owner might apply to purchase under section six of the act of 1872 and procure a patent under that act, by *complying with its provisions.*

That was not done in this case, for in this case the *application was pending,* and upon the change of the law by the passage of the act of 1872, applicant, finding his end lines not parallel, and that he stood to lose all right to the outside parts of his vein, should have withdrawn his application and proceeded *anew* under section six of the new law, or he should have asked to have his survey amended so as to *parallel* his end lines; but the applicant for the Pioneer claim *did neither* of these things, and took patent under the act of 1872, with divergent end lines.

After May 10, 1872, there was no such *possibility as that of a patent being issued under the act of 1866,* excepting when adverse rights existed.

Whether patents bearing date anterior to May 10, 1872, carried extralateral rights irrespective of parallelism of end lines, is immaterial in this case, for this patent having been issued *after that date* cannot *fall within the purview of the words of the last sentence of section nine of the act of May 10, 1872, which refers to patents theretofore issued.*

Consideration so far having been given to:

1. The historical conditions out of which the act of 1866 was passed, and

2. The terms of the act of 1866, and

3. The terms of the act of 1872: It remains to apply to the questions in hand the decisions of the Federal Courts construing these Federal statutes, all of such questions, in their very nature, being federal.

JURISDICTION.

In support of the jurisdiction herein, in addition to the authorities cited in the brief of plaintiff in error answering the motion to dismiss and affirm for want of jurisdiction, plaintiff in error cites the following from the opinion of Mr. Justice McKenna, delivered in *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S., 499.

"The rights of the parties are based on, and their deter-
"mination hence involves the construction of, the following
"sections of the Revised Statutes of the United States,
"empowering the location of mining claims:

* * * * * * * * *

"There are serious objections to accepting that consequence
"as determinative of our judgment. We might by doing so
"confirm titles in Colorado, but we might disturb them else-
"where. The statute construed is a Federal one, being a
"law, not only for Colorado, but for all of the mining States,
"and, therefore, a rule for all, not a rule for one, must be
"declared. Besides, what consideration should have been
"given to prior cases the Supreme Court of the State was
"better able to judge than we are. It may be that the repose
"of titles in the State was best effected by the reversal of the
"prior cases. At any rate, a Federal statute has more than
"a local application, and until construed by this Court cannot
"be said to have an established meaning. The necessity of
"this is illustrated, if it need illustration, from the different
"view taken of sections 2322 and 2336 in California, Arizona,
"and Montana, from that taken in the prior Colorado cases.
"The Supreme Courts respectively of those States and that
"Territory have adjudged a superiority of right to the cross
"veins to be in the senior location. Manifestly, on account
"of this difference, if for no other, this Court must interpret
"the sections independently of local considerations."

The right of plaintiff in error to the disputed ores, which lie within the segment of the "Silva" patented claim, Lot No. 86, is an inevitable consequence of such ownership of the land in which such ores are contained, as against defendant in error, whose claim to such ores, as will be shown, is not predi-

cated upon the existence of those conditions upon which alone an invasion of such Silva area is allowed by the mining law.

Leadville Mg. Co. v. Fitzgerald, Fed. Cases, No. 8158;
Cheesman v. Shreve, 37 Fed., 36;
Duggan v. Davey, 26 N. W., 887;
Doe v. Waterloo, 54 Fed., 935;
Iron Silver v. Elgin, 118 U. S., 98;
King v. Amy, 152 U. S., 222;
Argonaut Consol. M. & M. Co. v. Turner, 48 Pac., 685;
Del Monte v. Last Chance, 171 U. S., 55.

No right of invasion of the Silva area is asserted by defendant in error, other than that based on its ownership of the Pioneer quartz mine, Lot No. 48, and of its ownership of 1,589 94/100 feet of that certain vein apexing therein, which upon its downward course extends within such Silva area.

Record, pages 2 to 5 and page 30.

The titles to both the Pioneer quartz mining claim, Lot No. 48, and the Silva quartz mining claim, Lot No. 86, are creatures existing only under and by virtue of the mining laws of the United States, and hence are limited in their nature and attributes by such laws.

One of the controlling conditions of the mining law of the United States which limits the granting of any extralateral right upon an entry of mineral public land, is that "*the end lines of each claim shall be parallel to each other.*" Act of May 10, 1872, Sec. 2.

Under the patent of the Pioneer claim, Lot No. 48, issued under Act of May 10, 1872, the defendant in error claims the right to follow the vein into the Silva patented area between the extended planes of the end lines of the Pioneer claim, which end lines are not parallel to each other, but are to the extent of 14° 45′ divergent from each other in the direction of the dip of the vein, *to the result that upon the level of the ores in dispute, underneath the surface, such asserted claim embraces upon the course or strike of the vein four hundred feet more in length on the vein than the length of the apex of the vein measured between the end lines of the claim upon the surface.*

This contention of defendant in error, is, by the judgment of the State Court in this case, declared to be the law, and

upon it is based the granting of the relief as to the damages and the restraining injunction awarded to defendant in error.

Record, pages 34 to 36.

The limitation as to length of the vein upon and beneath the surface has always been one and the same, under the rules of the miners as well as under the statutes of the United States, and was always recognized everywhere as *absolutely controlling* in its effect upon the rights of mine owners.

If defendant in error can get damages from plaintiff in error and enjoin it from mining at the Northerly end of this *expanded and continually growing length under ground*, it can at the same time obtain the same relief at the southerly end, and in the language of Justice Field, "oust all his neighbors and take the whole ledge." Eureka Case, 4 Saw., p. 322.

This limitation as to *length upon the course or strike of the* vein from the surface downward, is one as to which all systems, rules of miners, Territorial, State and Federal statutes, and the decisions of all the Courts, have been of one voice from the beginning, with the sole exception of the judgment entered in this case.

It may fairly be anticipated that the justification of the decision of the State Court in this case will be placed upon the grounds assumed by defendant in error in that Court as shown by the brief of counsel for plaintiff there (defendant in error here), as follows:

"As a matter of *presumption*, the owner of a mining claim, "*prima facie*, owns everything underneath its surface, *usque ad* "*orcum*, and that the burden is upon the outside apex proprie- "tor, to show his right to penetrate underneath the surface "of another claim overlying the dip of the vein.

* * * * * * * * * * * *

"we admit that the weight of authority casts the burden upon "the outside apex proprietor, and that the burden never shifts "during the trial."

* * * * * * * * * * * * *

"We take up this burden cheerfully, and *thus outline our* "*contention:*

I.

"The title of the Argonaut Company to the Pioneer or "Argonaut Mine originated, ripened, and became vested in

"its predecessors under the act of July 26, 1866. This act did "not, either in terms or inferentially, require end lines to be "parallel, and no consequence is attached to a deviation from "parallelism.

* * * * * * * * * * * *

II.

"Although the end lines were not required to be parallel "under the act of 1866, yet if by any process of reasoning any "limitation upon the extralateral right was imposed upon the "locator's title, by reason of the divergence of the end lines, "such limitation was removed by the Act of May 10, 1872, "which granted to owners of locations theretofore made the "right to pursue the vein on its downward course, between "the end line planes of such location as it then existed.

III.

"The title evidenced by the certificate of purchase, issued "prior to the passage of the Act of 1872, was the complete "equitable title, equivalent for all practical purposes to the "issuance of a patent. Congress could not deprive the pur-"chaser of any rights acquired under that certificate, nor cast "upon such purchaser any additional burdens. It is quite "manifest, however, that Congress never intended that the "estate of any mining locator, held prior to May 10, 1872, "should suffer any diminution or curtailment by reason of "the Act passed on that day.

IV.

"The patent of the United States issued to the predecessor "in title of the Argonaut Company in terms grants the vein "throughout its entire depth, between the end lines described "in the patent, and these lines extended in their own direc-"tion. The Land Department had jurisdiction of the subject "matter. If more was given than the patentee should have "had, it is a question between the government and the paten-"tee; outsiders cannot collaterally assail the patent.

V.

"The Courts cannot construct end lines. The end lines "described in a patent issued by the Executive cannot be read-

"justed by the Judiciary. The extralateral rights of the "Pioneer must be determined by the calls of the patent in "connection with the law under which the right to it became "perfected, and the physical facts as to the course of the vein "through the ground.

VI.

"If this be not true, the only method for adjusting inequali- "ties for which any judicial precedent can be found, is an- "nounced in the Eureka Case, i. e., lines drawn at right angles "to the course of the vein—at the extreme points on the vein. "The application of this theory will give all the ore bodies in "dispute (and more) to the Argonaut Company.

VII.

"The Kennedy Mining and Milling Company, by reason of "its acts and conduct, and that of its predecessors in title, are "estopped from asserting that the Argonaut Mining Company "has no extralateral right in the vein in dispute."

To the first contention of defendant in error we make reply—

(1) That the owner of the Argonaut or Pioneer mine *did not have a title ripened and vested* under the act of Congress of July 26, 1866, no patent having been issued until after the repeal of that act and the enactment of the mining law of May 10, 1872, and that at the date last mentioned the title, both under general law, and under the provisions of sections one and five of the act of July 26, 1866, was still in *course of administration, and Congress had the reserved power of change and amendment* of the law which power was exercised by the enactment of the law of May 10, 1872.

After the passage of the Act of 1872, the owner of a location made under the Act of 1866 could obtain a patent under the provisions of that act where adverse rights existed or he could patent under the Act of 1872.

New Dunderberg v. Old, 79 Fed., 598.

But the rights of the patentee are restricted by the law under which the patent issued.

New Dunderberg v. Old, 79 Fed., 598.
Walrath v. Champion, 171 U. S., 507.

In cases of claims entered but not patented before the passage of the Act of 1872, the U. S. Land Department has jurisdiction to hear and determine whether the patent should not issue according to the provisions of the Act of 1872.

New Dunderberg v. Old, 79 Fed., 598.
Del Monte v. Last Chance, 171 U. S., 55.
Michigan v. Rust, 168 U. S., 589.
Brown v. Hitchcock, 173 U. S., 473.
Hawley v. Diller, 178 U. S., 476.

The Act of 1872 imposed such hearing on the Land Department as a duty.

New Dunderberg v. Old, 79 Fed., 598.

And see

Michigan v. Rust, 168 U. S., 589.

In such cases the issuance of the patent according to the provisions of the Act of 1872, is conclusive of the hearing and of all matters necessary thereto, including notice.

New Dunderberg v. Old, 79 Fed., 598.
Brown v. Hitchcock, 173 U. S., 473.

These cases clearly show that at any time before the patent itself issues, the Land Department may modify an entry so as to make it conform to the law.

In Michigan vs. Rust, *supra*, it is said:

"It is true a patent is not always necessary for the transfer "of the legal title. Sometimes an Act of Congress will pass "the fee" (cites authorities). "Sometimes a certification of "a list of lands to the grantee is declared to be operative to "transfer such title (Rev. Stat., Sec. 2449; Frasher v. O'Con-"nor, 115 U. S. 102). *But wherever the granting Act specifically "provides for the issue of a patent, then the rule is that the legal "title remains in the government until the issue of the patent* (Bag-"nell v. Broderick, 38 U. S., 13 Pet. 426-450); *and while so re-"maining the grant is in process of administration, and the juris-"diction of the Land Department is not lost.*"

In Del Monte vs. Last Chance, *supra*, it is said:

"By Section 2319, quoted above, the mineral deposits which "are declared to be open to exploration and purchase are

"those found in lands belonging to the United States, and "such lands are the only ones open to occupation and pur- "chase.

"*While this is true, it is also true that until the legal title has "passed the public lands are within the jurisdiction of the Land "Department, and, although equitable rights may be established, "Congress retains a certain measure of control. Michigan Land "and Lumber Company v. Rust, 168 U. S., 589. The grant is, as "is often said, in process of administration.* Passing to Section "2320, beyond the recognition of the governing force of cus- "toms and regulations and a declaration as to the extreme length "and width of a mining claim, *it is provided that 'no location of "'a mining claim shall be made until the discovery of the vein or "'lode within the limits of the claim located. * * * The end "'lines of each claim shall be parallel to each other.'*"

Here the power of Congress to modify an entry is directly asserted, the particular exercise of that power referred to being the granting of the privilege of going on another's location at any time before patent, and there setting stakes *for the purpose of making parallel the end lines of an outside location;* and this, notwithstanding the doctrine of Belk vs. Meagher, 104 U. S., 279, and Gwillim vs. Donellan, 115 U. S., 45, both of which are cited by the Court to the effect that a valid location of mineral lands "has the effect of a grant by the United "States of the right of present and exclusive possession of the "land located."

The Act of July 26, 1866, by express terms reserves in Congress the right to change the system of mining upon the lands of the United States, as well as the system of making government sales of such lands.

By Section 1 it is provided: "That the mineral lands of "the public domain, both surveyed and unsurveyed, are hereby "declared to be free and open to exploration and occupation "by all citizens of the United States, and those who have "declared their intention to become citizens, *subject to such "regulations as may be prescribed by law*, and subject also to the "local customs or rules of miners in the several mining dis- "tricts, *so far as the same may not be in conflict with the laws of the "United States.*"

By Section 5 of the same Act, it is provided. "That, as a "further condition of sale, in the absence of necessary legisla- "tion by Congress, *the local legislature of any state or territory*

"*may provide rules for working mines, involving easements, drain-*
"*age, or other necessary means to their complete development;* and
"those conditions shall be fully expressed in the patent."

This section was not repealed, and is yet law, and is found to be preserved in section 2338 R. S. U. S.—and such condition is set out in the Pioneer patent.

Record, page 28.

Thus the right of amendment and change of the law, both as to occupation and sales of mineral lands of the United States, is not only reserved but it is made a part of every government patent or conveyance of mineral land under the Act of 1866, and such condition *must* be expressed therein.

The provisions of section 4 of the same Act do not expressly declare any method of defining the vertical planes within which the right is given to follow the vein or lode into the land adjoining, although specifically prescribing the length along a lode that may be located "to any depth;" and hence arose difficulties such as those which were afterwards presented to the Courts in the Kenney, Eureka and other cases. The difficulties so encountered made necessary the exercise by the Congress of its paramount powers and especially of the powers reserved in the 1st and 5th sections above quoted, by revising and amending the law of 1866, as was done by the statute of May 10, 1872.

The exercise of such a power reserved in the original act is not an "impairment" of rights or titles acquired subject *to such power.*

The liberty of surface form allowable in locations made under the law of 1866 had no other nor greater significance than that under the law of 1872.

In Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U. S., 196, it is said: "Under the act of 1866, parallelism in the end lines of a surface location was not required." But, while construing this language, the court say, in Walrath v. Champion Mg. Co., 171 U. S., 293: "It may be that there was "liberty of surface form under that act" (the act of 1866) "but "the law strictly confined the right on the vein below the sur-"face. There is liberty of surface form under the act of 1872. "It was exercised in Iron Silver Mining Co. v. Elgin Mining & "S. Co., *supra*, in the form of a horseshoe; in Montana Co., Lim-

"ited, v. Clark, 42 Fed. Rep., 626, in the form of an isosceles "triangle."

For the shape of the Non-Consolidated claim in King vs. Amy, 152 U. S., 222, see Diagram G[1] on page 58.

The mining right was bounded by parallel end lines under the rules of miners before the passage of the Act of 1866.

In the Eureka case, 4 Sawy., 322, it is said:

"It is true that end lines are not in terms named in the rules "of the miners, but they are necessarily implied, and no rea- "sonable construction can be given to them without such "implication.

"If this were not so, he might by the bend of his vein hold "under the surface along the course of the ledge double and "treble the amount he could take on the surface. Indeed, "instead of being limited by the number of feet prescribed by "the rules, he might in some cases oust all his neighbors and "take the whole ledge. *No construction is permissible which "would substantially defeat the limitation of quantity on a ledge, "which was the most important provision in the whole system of "rules.*

"*Similar rules have been adopted in numerous mining districts, "and the construction thus given has been uniformly and everywhere "followed. We are confident that no other construction has ever been "adopted in any mining district in California or Nevada*; and the "construction is one *which the law would require in the absence of "any construction by miners.* If, for instance, the State were "to-day to deed a block in the city of San Francisco to twenty "persons, each to take twenty feet front in a certain specified "succession, each would have assigned to him *by the law* a "section parallel with that of his neighbor of twenty feet in "width cut through the block. No other mode of division "would carry out the grant."

This universal rule of the miners thus clearly defined by the court in the Eureka Case, is perfectly represented by Diagram O (see page 59), which is a copy of the diagram used by Judge Sawyer in illustrating his decision in Kinney v. Cons. Va. Mg. Co., 4 Sawy., 382, to show the method of locating on the Comstock. The end lines of each claim were parallel to each other and all were drawn at right angles to a datum line agreed upon as representing the strike or direction of the lode.

Diagram G[1]

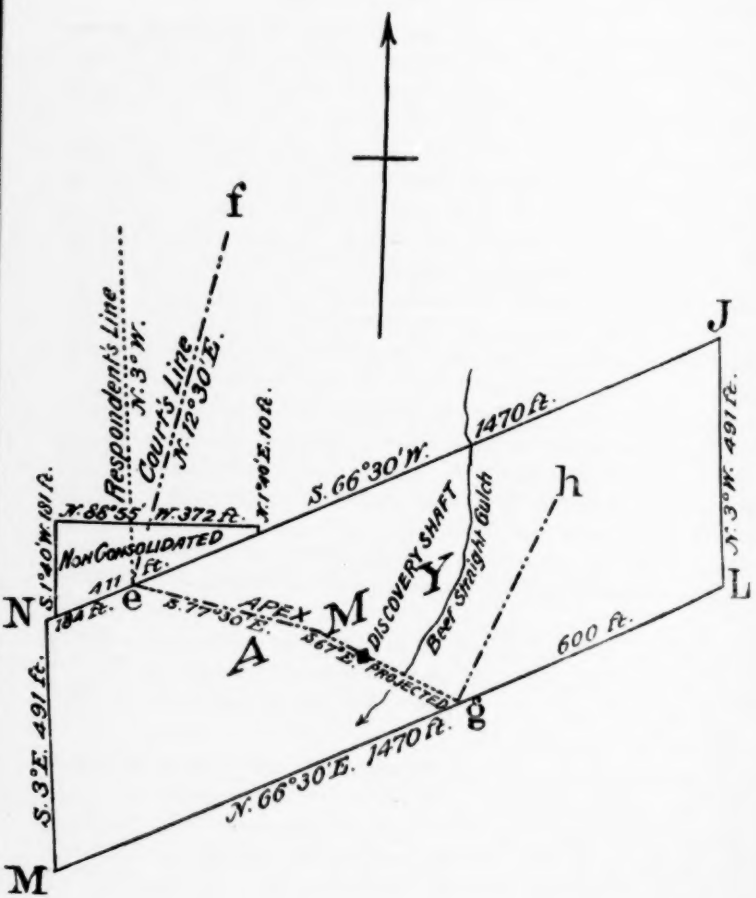

f
Respondent's Line
N. 3° W.
Court's Line
N. 12° 30' E.
J
1470 ft.
S. 66° 30' W.
N. 3° W. 491 ft.
L
h
N. 85° 55' W. 372 ft.
N. 1° 40' E. 10 ft.
S. 1° 40' W. 101 ft.
NON CONSOLIDATED
411 Ft.
N
e
184 ft.
S. 77° 30' E.
APEX
M
Y
A
S. 67° E.
DISCOVERY SHAFT
Beaf Straight Gulch
600 ft.
PROJECTED
g
S. 3° E. 491 ft.
N. 66° 30' E. 1470 ft.
M

Diagram O.

W.
Mason's or Complainant's Base and Course of Lode as claimed by Complainant
W. & M. SHAFT
KINNEY'S & CENTRAL No 2 SHAFT
N. 10° E.
Freeman or Defendant's Base and Course of Comstock Lode as claimed by Defendant
N. 5° W.
STAKE
50
210 ft.
933-7
215 ft.
500 ft.
50
100 ft.
300 ft.
150 ft.
200 ft.
100 ft.
S.
N.
1200 Level
KINNEY MASON BASE
CON. VA. SHAFT
0 Level
GOULD & CURRY
BEST & BELCHER
SIDES
WHITE & MURPHY
KINNEY, FREEMAN OR DEFENDANT'S BASE
CENTRAL No 2
CALIFORNIA
CENTRAL
OPHIR
MEXICAN
Course of end lines of all claims except Kinneys, at right angles to Freeman's Base.
E.

The mining right was bounded by parallel end lines under the law of 1866.

Section 4 of the act of July 26, 1866, provides "that no "location hereafter made *shall exceed 200 feet in length along* "*the vein* for each locator, with an additional claim for dis- "covery to the discoverer of the lode, with the right to follow "*such vein to any depth*, with all its dips, variations and angles."

It would appear to require no interpretation to show the intention of this language to be that a locator might locate the vein for the distance of only 200 feet, and that he was to be restricted on the dip of the vein within the particular distance of 200 feet located. And it is clear that such restriction on the dip would be physically impossible except by means of parallel end lines.

While interpreting this section of the Act of 1866, the court in the Eureka Case, after defining the universal rule of the mining districts concerning end lines, as above quoted, say, 4 Sawy., 323:

"The Act of 1866 in no respect enlarges the right of the "claimant beyond that which the rules of the mining district "gave him. The patent which the act allows him to obtain "does not authorize him to go outside of the end lines of his "claim, drawn down vertically through the ledge or lode. "it only authorizes him to follow his vein, with its dips, angles "and variations to any depth although it may enter land "adjoining, that is, land lying beyond the area included "within his surface lines. It is land lying on the side of the "claim, not on the ends of it, which may be entered. The land "on the ends is reserved for other claimants to explore. "* * * But the line of location taken does measure the "extent of the miner's right. That must be along the general "course, or strike, as it is termed, of the ledge or lode. Lines "drawn vertically down through the ledge or lode at right "angles with a line representing this general course at the "ends of the claimant's line of location, will carve out, so to "speak, a section of the ledge or lode within which he is "permitted to work and out of which he cannot pass."

The rule thus defined was the one finally adopted by the court in rendering its decision.

In Flagstaff v. Tarbet, 98 U. S., 463, it is said:

"But our laws have attempted to establish a rule by which "each claim shall be *so many feet of the vein lengthwise of its*

"*course to any depth below the surface*, although laterally its "inclination shall carry it ever so far from a perpendicular."

Again:

"The Act of 1872, 17 Stat. at L. 91, is more explicit in its "terms; but the intent is undoubtedly the same as it respects "end lines and side lines and the right to follow the dip out "side the latter."

(The Flagstaff case was a construction of a patent issued under the law of 1866.)

In Walrath v. Champion, 171 U. S., 293, the court first comments approvingly on the language last above quoted from the Flagstaff case, and adds:

"This law was followed and applied in Argentine Mining "Company v. Terrible Mining Co., 112 U. S., 478; and in "Iron Silver Mining Company v. Elgin Min. & S. Co., 118 "U. S., 222. *The locations passed upon in these cases were made "under the Act of 1872, but we have seen that the intent of that "Act and the Act of 1866, 'as it respects end lines and side lines,' "was the same.*"

Again: "It may be that there was liberty of surface form "under that act" (the act of 1866) "but the law strictly con- "fined the right on the vein below the surface."

A surface location under the law of 1866 bounds the extent of the mining right.

Section 4 of the Act of 1866 provided:

"No location hereafter made shall exceed 200 feet in length "along the vein for each locator with an additional claim for "discovery to the discoverer of the lode, with the right to "follow such vein to any depth with all its dips, variations "and angles, together *with a reasonable quantity of surface for "the convenient working of the same.*"

On this point it was held in the Eureka Case, 4 Sawy., 323, as follows:

"It is true, as stated by the defendant, that the surface "land taken up in connection with a linear location on the "ledge or lode is, under the Act of 1866, intended solely for "the convenient working of the mine, and does not measure "the miner's right, either to the linear feet upon its course "or to follow the dips, angles and variations of the vein, or "control the direction he shall take."

But, less than five years afterwards, the Supreme Court of the United States said in the Flagstaff case, 98 U. S., 463:

"The court refused to give the following instructions pro-
"pounded by the plaintiff in error, to wit: 'By the Act of
"'Congress of July 26, 1866, 14th Stat. at L. 253, under which
"'all these locations are claimed to have been made, it was
"'the vein or lode of mineral that was located and claimed;
"'the lode was the principal thing, and the surface area was
"'a mere incident for the convenient working of the lode;
"'the patent granted the lode as such, irrespective of the
"'surface area, which an applicant was not bound to claim;
"'it was his convenience for working the lode that controlled
"'his location of the surface area, and the patentee under
"'that act takes a fee simple title to the lode, to the full
"'extent located and claimed under said Act.'

* * * "It was not the intent of the law to allow a per-
"son to make his location crosswise of a vein so that the side
"lines shall cross it, and thereby give him the right to follow
"the strike of the vein outside of his side lines. That would
"subvert the whole system sought to be established by the
"law. If he does locate his claim in that way his rights must
"be subordinated to the rights of those who have properly
"located on the lode. Their right to follow the dip outside of
"their side lines cannot be interfered with by him. *His right*
"*to the lode only extends to so much of the lode as his claim covers.*
"If he has located crosswise of the lode and his claim is only
"100 feet wide, that 100 feet is all he has a right to. This
"we consider to be the law as to locations on lodes or veins."

In Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S., 55, it is said:

"Even under this statute" (the Act of 1866) "although its
"express purpose was primarily to grant the single vein, *yet*
"*the rights of the patentee beneath the surface were limited and con-*
"*trolled by his rights upon the surface.* If, in fact, as shown by
"subsequent explorations, the vein on its course or strike
"departed from the boundary lines of the surface location,
"the point of departure was the limit of right. In other
"words, he was not entitled to the claimed and patented num-
"ber of feet of the vein, irrespective of the question whether
"the vein in its course departed from the lines of the surface
"location."

Then follows a review of the Flagstaff litigation:

"These decisions" (McCormick v. Varnes, 2 Utah, 355, and the Flagstaff case) "show that while the express purpose of "the statute was to grant the vein for so many feet along its "course, yet such grant could only be made effective by a sur- "face location covering the course to such extent."

See also:

Cons. Wyoming v. Champion, 63 Fed., 540;
Walrath v. Champion, 171 U. S., 293;
Carson City v. North Star, 73 Fed., 597.

The courts have no power to make end lines.

Elgin v. Iron Silver, 14 Fed., 377;
Iron Silver v. Elgin, 118 U. S., 196;
King v. Amy, 152 U. S., 222;
Del Monte v. Last Chance, 171 U. S., 55.

The same end lines bound the extralateral right to all lodes the apices of which lie within the vertical boundaries of the claim.

Iron Silver v. Elgin, 118 U. S., 196;
Del Monte v. Last Chance, 171 U. S., 55;
Walrath v. Champion, 171 U. S., 293.

Contention 2 of defendant in error, is that the act of May 10, 1872, so enlarges the rights of one who has located a claim with surface end lines that are not parallel but diverge in the direction of the dip of the vein, is entitled to all the space between the planes of his end lines extended in their respective directions, so as to "oust all his neighbors" and take, if therein, all of the ledge.

The only authority for this pretense found in the books anywhere is contained in Lindley on Mines section 598 to section 600.

All of the statutes and cases on mining oppose such a result as being impossible under any laws of the United States, as is abundantly shown herein.

Contentions 3 and 4 relating to the entry, payment and issuance of receipt before May 10, 1872, for the Pioneer Mine, and the issuance of the patent therefor on August 12, 1872, in so

far as the same have not already been answered, will be treated together.

Notwithstanding the fact that the entry of and payment for the Pioneer Mine were made under the act of 1866, yet the property and title remained subject to administration, as before shown, and not only this, but the applicant, failing to withdraw the application entirely, or to have the survey corrected so as to make the end lines parallel, thereby voluntarily waived all claim to the extralateral right, which attaches only in cases of parallelism.

Act of 1872, Secs. 2 and 3.

In Hamilton Gaslight & Coke Company v. City of Hamilton, 146 U. S., 258 to 271, this court has said: "A legislative "grant to a corporation of special privileges, if not forbidden "by the Constitution, may be a contract; but where one of "the conditions of the grant is that the legislature may alter "or revoke it, a law altering or revoking, or which has the "effect to alter or revoke, the exclusive character of such priv-"ileges, cannot be regarded as one impairing the obligation of "the contract, whatever may be the motive of the legislature, "or however harshly such legislation may operate, in the "particular case, upon the corporation or parties affected by "it. The corporation, by accepting the grant subject to the "legislative power so reserved by the Constitution, must be "held to have assented to such reservation."

In William W. Gibbs v. The Consolidated Gas Company of Baltimore City, 130 U. S., pages 396-412, this Court uses the following language: "The consent of the corporation was not "required to the operation of such a provision as that em-"bodied in the fourth section of the act of 1882, but if accept-"ance were necessary, the exercise of corporate action by this "gas company after the passage of the amendment was suffi-"cient evidence of such acceptance."

In the Pennsylvania College Cases, 80 U. S., 190-222, this Court has said: "Authorized as the Act of the Legislature "was by the reservation contained in the original charter, and *'sanctioned as the Act was by having been adopted by the corpora-"tors, it is clear to a demonstration that the Act uniting the two "colleges was a valid Act, and that the two original corporations "became merged in the one corporation created by the amendatory "and enabling Act passed for that purpose. * * * Accepted as*

"that Act was by the trustees of the original institutions, they not "only ratified the reservation contained in the 5th section of the "Charter of Jefferson College, but they in express terms adopted the "changes made in the amended charter uniting the two institutions "in one corporation."

In Central Pacific R. R. Co. v. Gallatin, 99 U. S., 727-769, this Court uses the following language: "Each of the com- "panies was required to file in the Department of the Interior "its acceptance of the conditions imposed, before it could "become entitled to the benefits conferred by the Act. This "was promptly done by the Central Pacific Company, and *in "this way* that corporation voluntarily submitted itself to such "legislative control by *Congress as was reserved* under the "power of amendment."

And see Botillier v. Dominguez, 130 U. S. 238.

The granting of an extralateral right by the terms of a patent issued by the officers of the United States upon an entry of mining land, in violation of the conditions imposed by law governing the making of such a grant, is void.

Northern Pac. v. Cannon, 54 Fed., 252.
Doolan v. Carr, 125 U. S., 624.
Davis v. Wiebbold, 139 U. S., 507.
Francoeur v. Newhouse, 40 Fed., 618.
Rose v. Richmond, 17 Nev., 25.
Richmond v. Rose, 114 U. S., 576.
Best v. Polk, 18 Wall., 112.
Sherman v. Buick, 3 Otto, 209.
Smelting Co. v. Kemp, 104 U. S., 641.
Wright v. Rosebury, 121 U. S., 488.
Deffeback v. Hawke, 115 U. S., 392.
Lakin v. Dolly, 53 Fed., 333.
Lakin v. Roberts, 54 Fed., 461.

A case where exactly the same thing was done that plaintiff in error claims should be done in the case at bar, is the case of Iron Silver Mg. Co. v. Elgin M. & S. Co., 118 U. S., 196.

Diagram J illustrates that case. (See page 66.)

In that case the patent for the Stone claim contained a grant of a segment of land, and, nominally, a grant of the extralateral right. The patent contained only the usual exceptions and reservations.

Diagram J.

Surv. No 490
GILT EDGE
(Disputed Ground)
STONE
Outcrop
Center Line
of
Apex
and
Surv. No 217
North End Line
Direction of Dip
Direction of Strike
South End Line
Side
Lode
1
2
3
4
5
6
7
8
9
10
11
12
13
14

In deciding the case the court say: "We are, therefore, of "opinion that the objection that by reason of the surface form "of the Stone claim, the defendant could not follow the lode "existing therein in its downward course beyond the lines of "the claim, was well taken to the offered proof."

The conclusion of the court is that, *while the grant of the land segment was good, the attempted grant of the extralateral right in connection therewith was absolutely void as against law.*

And so here we claim that, although the grant of Lot 48 was good, the attempted grant of the extralateral right in connection therewith was absolutely void as against law.

As to the government only having the right to complain of this patent being void as to the extralateral right, we reply that under its patent to the Silva mine, Lot No. 86, plaintiff in error is the *grantee of the government*, and has *whatever rights the government had.* Plaintiff in error is in precisely the same position as were the owners of the Stone claim in the case just cited.

The fifth ground of contention is to the effect that "the "Courts cannot construct end lines. The end lines described "in a patent issued by the Executive cannot be readjusted "by the Judiciary. The extralateral rights of the Pioneer "must be determined by the calls of the patent in connection "with the law under which the right to it became perfected, "and the physical facts as to the course of the vein through "the ground."

All this meets with our hearty concurrence.

The sixth ground of contention of defendant in error, is the anthithesis of the last above, and is only stated to be true, alternatively, that is:

"If this be not true, the only method for adjusting inequali- "ties for which any judicial precedent can be found, is "announced in the Eureka case, i. e. lines drawn at right "angles to the course of the vein—at the extreme points on "the vein. The application of this theory will give all the ore "bodies in dispute (and more) to the Argonaut Company."

This is the ground taken by the Supreme Court of the State of California in its opinion in this cause but by its judgment *affirming the judgment of the court below, all the ledge between divergent end lines* was given to defendant in error.

Granting that the doctrine claimed can be extracted from

the opinion announced by the Circuit Court in the Eureka case, still that doctrine has been long abandoned.

The settled rule is as stated below.

The Flagstaff case (98 U. S., 463) construed a patent issued under the law of 1866, and compared that law with that of 1872, using this language:

"The language of the Act of 1866, 14 Stat. at L., 251, in rela-
"tion to 'a vein or lode' is, 'That no location hereafter made
"'shall exceed two hundred feet in length *along the vein* for
"'each locator, with an additional claim for discovery to the
"'discoverer of the lode, with the right to follow such vein
"'*to any depth*, with *all its dips, variations and angles*, together
"'with a reasonable quantity of surface for the convenient
"'working of the same as fixed by the local rules,' etc. The
"Act of 1872, 17 Stat. at L. 91, is more explicit in its terms;
"but the intent is undoubtedly the same, as it respects end
"lines and side lines, and the right to follow the dip outside of
"the latter.

* * * * * * * * *

"As the law stands, we think that the right to follow the dip
"of the vein is bounded by the end lines of the claim, properly
"so called, which lines are those which are crosswise of the
"general course of the vein on the surface."

In King v. Amy Cons. M. Co. (152 U. S., 227-8), reversing the Supreme Court of Montana, this court says:

"It is evident from the provisions cited" (R. S. of U. S., Sec. 2324) "that the location as made and defined must control not
"only the rights of the claimant to the vein or lode within its
"surface lines, but also any lateral rights."

* * * * * * * * *

"The court cannot become a locator for the mining claimant
"and do for him what he alone should do for himself. The
"most that the court can do, where the lines are drawn inac-
"curately and irregularly, is to give to the miner such rights
"as his imperfect location warrants, under the statute. It
"cannot relocate his claim and make new side lines or end
"lines."

In Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S., 196, it is held:

"The provision of the statute, that the locator is entitled
"throughout their entire depth to all the veins, lodes or

"ledges the top or apex of which lies inside of the surface lines "of his location, tends strongly to show that the end lines "marked on the ground must control. It often happens that "the top or apex of more than one vein lies within such sur- "face lines, and the veins may have different courses and "dips, yet his right to follow them outside of the side lines of "the location must be bounded by planes drawn vertically "through the same end lines. The planes of the end lines can- "not be drawn at a right angle to the courses of all the veins "if they are not identical.

* * * * * * * * *

"If it is expedient to change the rule, legislative action "should be invoked, as it would operate only in the future, "and not judicial decision which would affect past cases as "well.

"This view of the controlling effect of the end lines of the "surface location is also sustained by the decision of this court "in the Flagstaff Case, Mining Co. v. Tarbet, 98 U. S., 463."

In Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S., 87, after a review of these cases this court says that they settle these propositions:

"That the end lines of the location as made by the locator, "are the only lines that will be recognized; that the courts "have no power to establish new lines or make a new loca- "tion."

The last case decided of which we have report touching the question of extralateral right is that of Walrath v. Champion Co., 171 U. S., 293, in which the court was called upon to construe a patent issued Apr. 28th, 1871, upon a location made under the law of 1866.

In this case the patented area of the Providence location presented a northerly end line having two planes, that is, a broken or elbowed line, thus, "f_____g_____h" f—g—g—h. The southerly end line was parallel to the line g—h, and hence not parallel with f—g. The Providence vein, upon which the location was made passed across the line g—h, and the "Contact" vein in dispute passed across the line f—g.

The question was which of these lines constituted the direction of the plane by which to control the right to follow the "Contact" vein on the dip.

The court, speaking by Mr. Justice McKenna, says:

"The extent of the right passing under the act of 1866 has "been decided by this court", and proceeds to quote in support of the statement, the doctrines of the Flagstaff case as hereinabove given, and adds:

"And after stating that the act of 1872 was more explicit "than the act of 1866, but the intent of both undoubtedly the "same, as it respects lines and side lines, and the right to "follow the dip outside of the latter, he" (Mr. Justice Bradley) "proceeded as follows:"

Here the court quotes at length from the Flagstaff opinion, and then says:

"This law was followed and applied in Argentine Mining "Company v. Terrible Mining Company, 122 U. S., 478; and "in Iron Silver Mining Company v. Elgin Min. & S. Co., 118 U. "S., 196; King v. Amy & Silversmith Consol. Min. Co., 152 "U. S., 222.

"The locations passed upon in these cases were made under "the act of 1872, but we have seen that the intent of that act "and the act of 1886, 'as it respects end lines and side lines' "was the same."

The court then proceeds to quote approvingly from the opinion in the Del Monte case, as follows:

"First, the location as made on the surface by the locator "determines the extent of rights below the surface."

The seventh and last contention of defendant in error is that:

"The Kennedy Mining and Milling Company, by reason of "its acts and conduct, and that of its predecessors in title, "are estopped from asserting that the Argonaut Mining Com-"pany has no extralateral right in the vein in dispute."

This evidently relates to the agreement made between the *grantor* of plaintiff in error, *as to the Kennedy mine* and the *grantor* of defendant in error as to the *Pioneer mine*, under which a surface boundary between the two was agreed upon in the land office, as to which agreement plaintiff in error *was not a party*, and as to the existence of which *plaintiff in error took without notice*, and which in no way *concerns the Silva mine.*

Record, pages 15, 16 and 57.

The objections of plaintiff in error to the consideration of such agreement in the trial court were sustained, and so such agreement was "cut out of the case."

Record, page 55 and page 57, Fol. 113.

The effect of the rule adopted by the Superior Court and affirmed by the Supreme Court of California in the case at bar, was well illustrated by the leading counsel for defendant in error, in the brief filed by him in this court in opposition to the issuance of a writ of *certiorari* in the case of Walrath v. Champion (171 U. S., 293).

Counsel used the following language on page 22 of his brief, "Figure 6," referred to by him, being the same as "Diagram D'," found on page 72 hereof.

"In Figure 6 (see page —), we have the Providence location "A with the contact ledge X^1—X^2 crossing the line f—e at "an assumed point X, and extending on its course through an "assumed location D.

"There was some evidence introduced at the trial tending "to show that the ledge passes out of the line f—e approxi- "mately at the point X. But we are now dealing with this as "an hypothesis.

"The location 'D' is under the Act of 1872, and, of course, "junior in point of time to 'A.' D is a regular valid location, "covering 1,500 feet of the apex of the ledge X—X^1—X^2. "The end lines are parallel to each other and crosswise of the "lode.

"If the petitioner's theory is correct, that his northerly "bounding plane is to be drawn through f—g—g', it follows "as a corollary that the same rule is to be applied to the "crossing on the line f—e at X. He will, therefore, have all "the segment of the contact ledge lying between vertical "planes drawn through the lines f—g—g' and f—e—k—e', "and those lines produced indefinitely.

"Say the length of the ledge X—X^1—X^2 within the surface "lines of his location f—g and f—e is 700 feet, the dip being "in the direction of the arrows. Petitioner follows the ledge "on its downward course between vertical planes drawn as "above stated.

"When he reaches 2,000 feet in depth on the downward "course of the vein, he has *five thousand linear* feet of the ledge

Diagram D¹.

"between the points g′ and e′ with a surface *apex* of only 700 "feet. 'D,' who has a regular valid location, with 1,500 feet "of the apex, could on plaintiff's theory take nothing below "the plane drawn through e—k—e′.

"Can petitioner seriously contend that Congress intended to grant him any such extraordinary rights?

"No locator under the Act of 1872 could acquire any such "privilege. Can it be said that that Act gave to the petitioner "on the contact ledge a greater right and a larger privilege "than it was *possible* to obtain with a similar form of location "made under the Act itself?"

The "contact ledge" referred to was not the *original* Providence vein, but was one of the "*other veins*" having their apices within the vertical boundaries of the Providence Mine, title to which "other veins" was acquired by the owners of the Providence by virtue of Section 3 of the Act of 1872. (Sec. 2322, R. S. of U. S.)

It would seem that this court was much impressed by the foregoing illustration: for, on finally deciding the merits of the case on appeal, Walrath v. Champion, 171 U. S., 293, the court itself sets up a most potent argument, apparently based on the Lindley illustration, to show why the rule of parallelism declared by the statute of 1872 applies not only to locations and patents under the law of 1872, but to those under the law of 1866 as well.

The court say:

"It may be true that under the Act of 1866 the patenting "of the Providence Mine in its irregular shape was in all "respects legal and proper, and that the Act did not require "the location to be made in the form of a parallelogram or in "any particular form, and that there was no requirement that "the end lines should be parallel. *It is also true that under that "Act only one vein could be included in a location, no matter how "much surface ground was included in the patent, but that under the "Act of 1872 possession and enjoyment of all the surface included "within the lines of their location and of all veins, lodes and ledges "throughout the entire depth, the top or apex of which lies inside of "such surface lines extended downward vertically, were given.*

"But rights on the strike and on the dip of the original vein, "and rights on the strike and on the dip of the other veins, we "have decided, are determined by the end lines of the loca-"tion."

Counsel on both sides in that case, each from his own standpoint, having "conceded" in argument that as to locations and patents under the Act of 1866 the end lines of the surface locations need not be parallel, the court, by the foregoing language conceding argumentatively that such *might* be the case, proceeds to call attention to the fact that by means of such locations title to only a single vein could be obtained; and that, if the rule of nonparallelism should be invoked as to such single vein, it must be borne in mind that the Act of 1872 confers title to all other veins whose apices are within such locations, so that, *as all the lodes within a location must be bounded by the same end lines*, the rule of nonparallelism would have to be applied, with the result shown by the illustration, to a set of lodes the title to which was conferred by a statute the cardinal principle of which is parallelism.

The language of the court implies that no such extraordinary privilege can be conceded as to such "other veins" within old locations; and if not, then, since all the lodes within a location must be bounded by the same end line planes, it is clear that the *original* vein must be bounded by parallel planes, so as to be included within the same planes bounding the "*other veins*", which planes, for the reasons shown, must be parallel.

CONCLUSIONS.

From the foregoing principles, we deduce the conclusions:

1. The ownership as to *length upon the course or strike* of a vein, both on the surface and beneath the surface is limited by the *surface lines* of the location.

2. That the "outside parts" of such vein beneath the surface to which the extralateral right attaches cannot *exceed such length so fixed by the surface lines.*

3. That the *end line planes*, to justify a claim of extralateral right *must not be divergent* in the direction of the dip of the vein.

4. That where the end line planes are *divergent in the direction* of the dip of the vein, *no extralateral right exists.*

Plaintiff in error respectfully insists that the judgment of the Supreme Court of the State of California ought to be re-

versed, with directions to such court to order the Superior Court of the County of Calaveras to render judgment upon the merits in favor of plaintiff in error herein, the defendant in such state courts.

Respectfully submitted,

JOHN M. WRIGHT,

BYRON WATERS,

Attorneys for Plaintiff in Error.

JOHN GARBER,

Of Counsel.

We attach hereto and file herewith the argument of Mr. John M. Wright in the trial court and respectfully ask that the same be considered in connection with this brief as part of our argument in this cause.

Respectfully submitted,

JOHN M. WRIGHT,

BYRON WATERS,

Attorneys for Plaintiff in Error.

JOHN GARBER,

Of Counsel.

KENNEDY v. ARGONAUT.

In Supreme Court of the United States.

Here follows:

1. Index of Diagrams illustrating the Argument following.
2. The Argument of Mr. John M. Wright in the trial court, above referred to.
3. Transcript of Record in No. 1408 (this Cause), as used on said Argument.

ARGONAUT v. KENNEDY.

Hearing October 17, 18, 19, 20 and 21, 1898.

INDEX OF DIAGRAMS ILLUSTRATING THE ARGUMENTS FOR DEFENDANT.

The paging refers to the within pages of the Argument of John M. Wright, where these Diagrams are used.

FIRST SERIES.

DIAGRAM.	PAGE.	
A	220	Shows segment paralleling south end line of Pioneer.
B	221	Shows segment paralleling north end line of Pioneer.
C	222	Shows segment with converging end lines, one paralleling the north end line and the other the south end line of the Pioneer.
D	224	Shows segment with end lines drawn so as to divide evenly the surplus angle of the Pioneer.
E	235	Shows segment with end lines drawn at right angles to the Pioneer Lode.
F	230	Shows segment with end lines drawn at right angles to south half of Kennedy Lode, the part south of the bend.
G	231	Shows segment with end lines drawn at right angles to north half of Kennedy Lode, the part north of the bend.
H	232	Shows segment with end lines drawn at right angles to line from south end center of Pioneer claim to bend in Kennedy Lode.
I	233	Shows segment with end lines drawn at right angles to line from center of north end of Kennedy claim to center of south end of Pioneer claim.
J	101	Shows Stone and Gilt Edge claims, illustrating the Elgin case, 118 U. S. 196.
K	128	Shows Mammoth claim, illustrating the Lakin cases, 53 Fed. 333; 54 Fed. 461; 154 U. S. (Mem. Dec.)
L	112	Shows Isosceles Triangle claim, illustrating case of Montana Co. v. Clark, 42 Fed. 626.

DIAGRAM.	PAGE.	
M	228	Shows ideal location, with end lines at right angles to the strike.
N	228	Shows ideal location, with end lines crossing the strike diagonally.
O	58	Illustrates the case of Kinney v. Cons. V. Co., 4 Sawy. 382.
P	21	Illustrates the Eureka case, 4 Sawy. 302.
Q	*Frontispiece.*	Minimized copy of the Large Map used at the Argument, with additional details.
R	6	Shows the elements of the Argonaut v. Kennedy case.
S	16	Shows Providence and New Years claims, illustrating the case of Walrath v. Providence, 63 Fed. 552; 72 Fed. 978; 171 U. S. —.
		SECOND SERIES.
A'	90	Illustrates the Flagstaff v. Tarbet case, 98 U. S. 463.
B'	142	Illustrates the Cons. Wyoming v. Champion case, 63 Fed. 540.
C'	226	Shows the diverging end lines of Pioneer, and triangles a—b—c.
D'	212	Illustrates C. H. Lindley's divergent end line argument in the Providence case before U. S. Supreme Court.
E'	94	Shows triangle in conflict between Pioneer and Kennedy, if Eureka case rule were applied.
F'	30	Shows the Silva King claim and patent, illustrating the case of Doe v. Waterloo, 54 Fed. 935.
G'	3	Shows Amy and Non Consolidated claims, illustrating case of King v. Amy, 152 U. S. 222.
H'	173	Shows Del Monte, New York and Last Chance claims, illustrating Del Monte v. Last Chance case, 171 U. S. 55.
I'	189	Illustrates decision in North Star case, 73 Fed. 597; 83 Fed. 658.
J'	76	Shows segment with end lines at right angles to a line drawn from Kennedy North center to its South center.

FOLD OUT IS TOO LARGE TO BE FILMED

gram

South center.

IN THE

Superior Court of the County of Calaveras

AND

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY,
Plaintiff,
vs.
KENNEDY MINING AND MILLING COMPANY,
Defendant.

Two Actions, Nos 1408 and 1179.

Argument of John M. Wright

FOR DEFENDANT UPON FINAL HEARING BEFORE

HON. G. W. NICOL, JUDGE

OF THE SUPERIOR COURT FOR TUOLUMNE COUNTY, CALIFORNIA, SITTING FOR THE COUNTY OF CALAVERAS, AT SAN FRANCISCO, OCTOBER 18, 19 AND 20, 1898.

[NOTE. The references are to the printed transcript in No. 1408. The record in No. 1179 was not printed.]

Tuesday, October 18, 1898.

THE ELEMENTS OF THE DISPUTE.

If your Honor please:

To our thinking there is a vast mass of material in this agreed statement of facts, that does not belong there.

We think that this case when stripped down to its elements—to those portions which are material—is a very simple one.

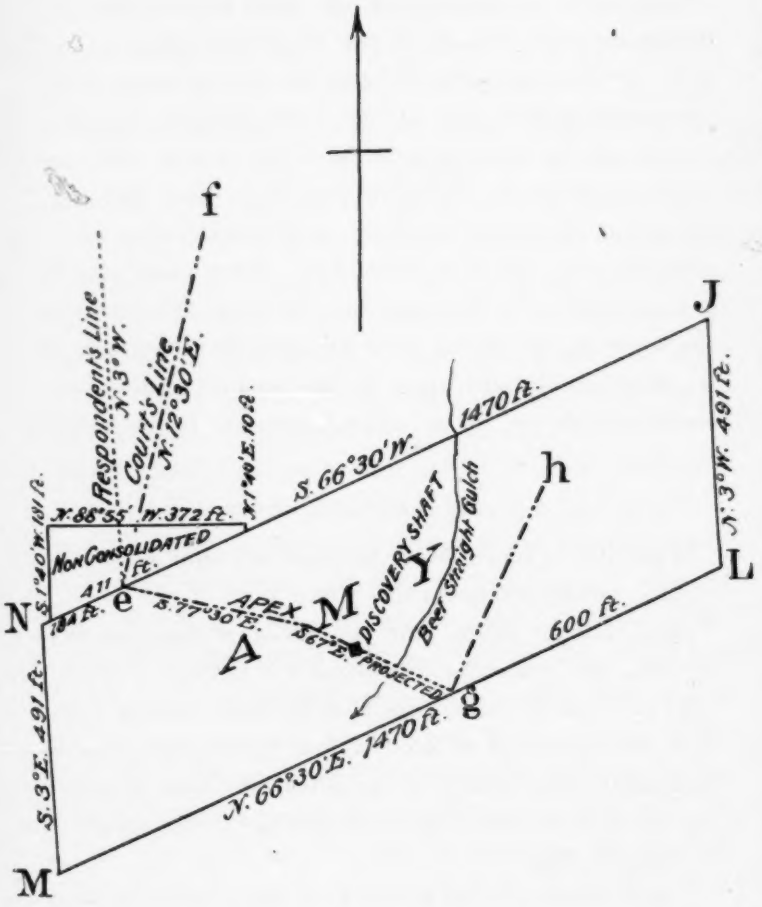
We say first that we are the owners of a mine down here (showing as on Diagram Q) which is called the Silva Mine; and that we have extracted certain ores from underneath the surface of this Silva Mine. We say that under the law as it has been frequently adjudicated, *prima facie* that ore belongs to us. The cases that I desire to call your Honor's attention to—and I will hand this little list of cases to your Honor upon the proposition—are to the effect that the owner of the surface owns all beneath except as against an owner following down on its dip underneath such surface, a vein having its apex within a properly located claim outside.

These cases are:

Cheesman v. Shreve, 37 Fed. 36;
Duggan v. Davey, 26 N. W. 887;
Doe v. Waterloo, 54 Fed. 935;
Cons. Wyoming v. Champion, 63 Fed. 540;
Iron Silver v. Elgin, 118 U. S. 98;
King v. Amy, 152 U. S. 222;
Argonaut Consol. M. & M. Co. v. Turner, 48 Pac. 685.

There is only one of these cases that I desire to refer to, as the law is so well settled and is admitted by counsel. It is the case of King v. Amy, 152 U. S. 419, represented by this little map (producing Diagram G[1]). Can your Honor see the outline?

Diagram G¹


f
J
Respondent's Line
N. 3° W.
Court's Line
N. 12° 30' E.
N. 1° 40' E. 10 ft.
1470 ft.
S. 66° 30' W.
N. 3° W. 491 ft.
h
N. 88° 55' W. 372 ft.
S. 1° 40' W. 191 ft.
NON CONSOLIDATED
411 ft.
Y
L
N
e
184 ft.
S. 77° 30' E.
APEX
M
DISCOVERY SHAFT
Bear Straight Gulch
A
387 ft.
PROJECTED
600 ft.
g
S. 3° E. 491 ft.
N. 66° 30' E. 1470 ft.
M

THE COURT. Yes.

MR. WRIGHT. I desire to quote a few words from the decision in this case merely because of the peculiar language making the proposition so definite and certain.

The ores in dispute in this case were within this little triangular claim known as the Non-Consolidated (showing). The outside party claimed the ores by virtue of its ownership of this lode (showing Amy lode) extending across the side lines of this claim as located. The Supreme Court of the United States in deciding this case, decided as the first proposition, that, unless the owner of this (showing) the Amy claim had a right to go outside of this side line in this direction (showing) and take this ore (showing) on its dip from underneath the surface of the Non-Consolidated, then the ore became a part of the Non-Consolidated claim. The language is peculiarly strong:

"It became a part of that claim."

It is entirely unnecessary to waste the time of counsel and the Court talking on this point.

Next, having taken this ore from within our own ground, the plaintiff, who owns a claim at a distance known as the Pioneer, says that its vein extends down from this (showing as on Diagram Q) its apex, to and underneath the surface of the Silva, and that therefore the ore that we have taken out belongs to the owner of the Pioneer Mine.

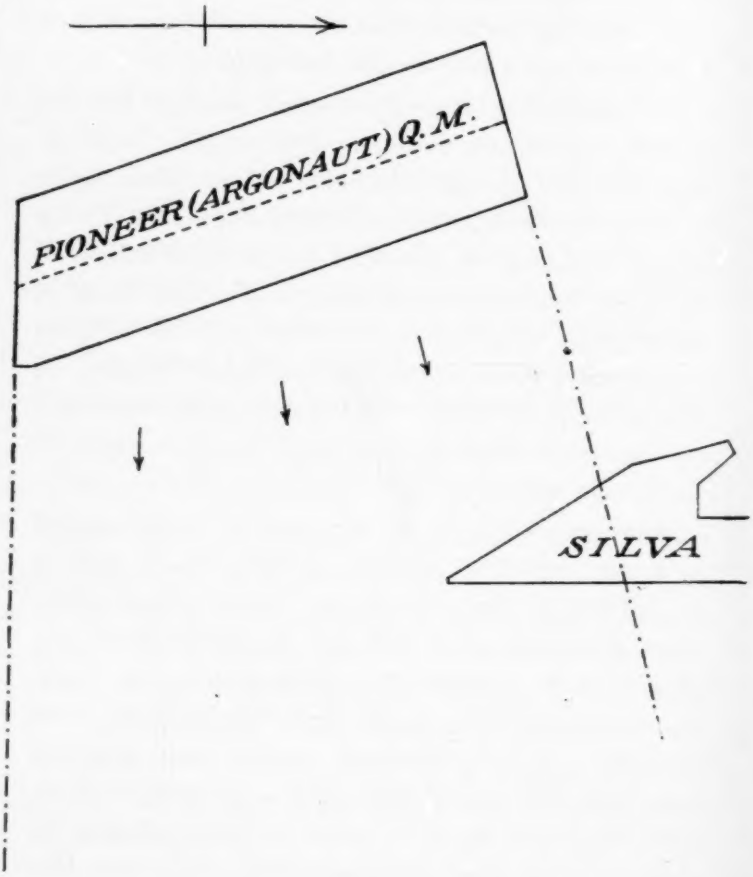
Now I submit to your Honor that that is all there is for the consideration of the Court in this case. It brings up

for discussion primarily the complaint; afterwards the principal proof by which that complaint is to be established, namely, the patent of the Pioneer Mine, our ownership of the Silva being admitted. Counsel admits that we have a right under the pleadings—under the general issue—to set up our title to the Silva as a defense to their claim to the ores which we have taken out.

Now counsel has referred somewhat jocularly but in a friendly way, to this little pamphlet of mine which he calls my "post-mortem argument." Your Honor has a copy and I would like to show a little diagram at the top of page 20 (hands the pamphlet to Court). I submit to the Court that, notwithstanding such a large mass of material has been brought into this case—for no good reason that I can see—that little diagram (Diagram R) contains all of the elements of this case of Argonaut Mining Company v. Kennedy Mining & Milling Company, as it now stands before the Court.

Before proceeding to the argument of what is necessarily the principal question in this case, I wish in my own way very briefly to review these objections, premising what will not be denied—what has already been asserted by counsel—that the plaintiff must necessarily stand upon the strength of its own title. And if it does not have the right to follow down that vein, and if that right is not sufficiently alleged, that is to say, if it is not definitely alleged, the plaintiff's case must necessarily fall. It is upon that proposition and for that reason that we have objected to

Diagram R.



so much of this extraneous, this irrelevant and immaterial, matter in this case.

The Plaintiff's Theory.

I submit to the Court that counsel throughout this argument has presented this matter to the Court as though these two companies were partners from the beginning, away back in 1871 and 1872 when these patents were gotten out—as though they had been partners. The whole argument has been based upon that idea though without ever using the word; and that there was a dispute between them and that they finally agreed as to what share of the partnership property each should have. And counsel unkindly, as I think, has suggested that the Kennedy Mining and Milling Company, after taking its share, now wants to get a share of what belongs to the other side, as though the *Kennedy Mining & Milling Company* had agreed that such and such a portion of this lode might belong to the *Argonaut Mining Company* or to its predecessor in interest. I say that that is an element foreign to this case. If the Kennedy Mining & Milling Company has had the good fortune to own a rich mine and has or has not followed down a great lode to great depths within the earth, taking out rich ores and making its stockholders rich, is that any reason why the Kennedy Mining & Milling Company should not have any other ores to which it is entitled? Does that estop the Kennedy Mining & Milling Company from obtaining other titles, either in the Jackson Mining District or elsewhere?

If the Pioneer Company first, and the Argonaut Company afterwards, has failed to secure title to those ores, as we claim, has the Kennedy Mining & Milling Company no right to those ores simply because it is a rich company, because it has been fortunate enough to get money out from underneath the surface by following down its own ledge?

I submit that this is the gist of the argument upon which counsel bases his claim for retaining all this mass of material in this case. And I submit further that, notwithstanding the extreme courtesy of counsel on the other side, he has unnecessarily gone out of the record in trying to bring in ethical questions, as he termed them in fine phrase.

It is a question of right; it is a question of law. The Kennedy Mining and Milling Company wants this ground and the ores underlying it, and wishes to retain the money that it has taken out of that ground, if it belongs to it. And if it does not belong to it in the judgment of the Courts of this country, it does not want a cent of it.

The Pleadings.

Now, perhaps it is desirable for me to present our views of these pleadings, very briefly. As Judge Lindley has stated their substance quite fully and fairly, it will not be necessary for me to go over them in detail. Of course we admit that the Argonaut Mining Company is a corporation, and that the Kennedy Mining Company is a corporation.

We admit in our answer the allegation in the plaintiff's complaint that the plaintiff owns the segment of land known as Lot No. 48, indicated by the pink shading on the plaintiff's map (showing as on Diagram Q). It owns that particular segment of land and we admit that it owns that segment of land exactly as it is described.

Immediately after having alleged its ownership of this segment of land, the plaintiff then proceeds to allege its ownership of the extra-lateral right, and says:

(Reading) "And plaintiff avers that at all of said times "it was and now is the owner, in the possession of and en- "titled to the exclusive possession of 1589 $^{94}/_{100}$ linear "feet of that certain quartz vein or lode known as the "Pioneer Quartz Vein or lode, which has its apex within "the premises hereinbefore described, with the exclusive "right to said 1589 $^{94}/_{100}$ feet of said lode throughout its "entire depth, although it may enter the land adjoining."

There is another allegation, a further allegation, as to the ownership of other veins; but we are not concerned with that, because, according to the stipulation, the ores in dispute were taken out of the Pioneer vein.

I will touch upon this subject further when I come to consider the last of the objections; but I wish at this time to call the Court's special attention to the condition of this allegation. The plaintiff avers that it is entitled to the exclusive possession of 1589 $^{94}/_{100}$ linear feet of a certain quartz vein; but I submit to the Court that neither in this paragraph of the complaint nor any where else in the complaint, has the plaintiff defined the particular segment of 1589 $^{94}/_{100}$ linear feet of the vein that is claimed.

I submit further to the Court that the plaintiff has nowhere alleged the claim it now makes before this Court to the ownership of a segment of the vein, of that entire segment of the vein bounded on the north by the line A-B extended in the direction of B^1, and on the south by the south end line of the Pioneer Mine extended in its own direction easterly (showing as on Diagram Q).

That is the claim of plaintiff before the Court, but where is it alleged? Nowhere in this complaint. The plaintiff must necessarily stand upon his complaint. It was his province, if he chose, to come here and make this allegation. But we were never put upon notice that that was his claim, and only within the last half hour I have first learned definitely that that is the plaintiff's claim.

He has claimed 1589 $^{94}/_{100}$ feet of this lode (showing as on Diagram Q) throughout its entire depth, and no more. He has not even taken the trouble to show us where those 1589 feet of the vein are located. He has shown us the apex of his vein but no more, with end lines diverging in the direction of the dip. Now if a party comes into this Court and says he owns a certain thing, he must of necessity define that thing, so that there can be no reasonable doubt as to what it is that he claims. But I submit that the last hour of the argument of counsel clearly shows that he knows that he has not so defined the segment of the ore that he claims—that this Court does not know what particular segment of the ore he claims, either by reference to the complaint or without it. Nothing can stand in this case that is not included within these pleadings.

The complaint next alleges that we sunk a shaft. We do not deny that. We used that shaft as a mere conduit for the ores underneath. We might have sunk the shaft vertically down from the surface of the Silva ground. We did not do so; we went west of the Silva ground and started our shaft here (showing as on Diagram Q) at the point "X". We sunk it down in such a way as to reach these ores underneath the Silva ground. Was it necessary in order to show that we had sunk this shaft—whether within ground that we own or within ground that we don't own—was it necessary to allege all these matters of title to what the Kennedy Mining & Milling Company owned? Not at all!

This shaft is a mere conduit for the ores. The question of the title of the Kennedy Mining & Milling Company has nothing whatever to do with this shaft. It was simply a means by which we got under the ground.

In passing through these pleadings, I may call the Court's attention to the method by which the plaintiff has alleged its ownership of the segment of ground known as Lot No. 48. Counsel says he knows of no decision showing that the beginning point has anything to do with the question of title, or words to that effect. I shall not at this time submit authorities upon that point, but I call the Court's attention to the fact that, although the plaintiff might have begun at any corner he chose and with any line he chose in defining his ownership, he has chosen as the base line of his title the south end of the Pioneer Mine, and that all the lines of his title are deduced from that base line.

It is true that his description was derived from the patent itself, but if he chose or if it was his intention, not to stand upon that particular line as the base line of his title, he had the option to otherwise describe that particular segment of ground. He did not do so but followed the patent in establishing that as his base line.

The answer admits that as the established base line of the property, and I take it as an established fact in this case for whatever it may or may not be worth.

Review of Defendant's Objections to Certain of the Stipulated Facts.

At this time it is logical and proper for us to take up our objections, and to base our argument upon those objections which will bring up the questions we desire to present to the Court.

Our first objection is to paragraph IV, which shows the corporate capacity of the Kennedy Mining Company.

We object to that principally because it is irrelevant and immaterial, but because it is irrelevant and immaterial, we care nothing about it one way or the other except that it lumbers the record.

As I stated before, the title under which we claim is our title to the Silva Mine, and the corporate capacity of the Kennedy Mining Company has nothing to do with this case. The same may be said about the action of the Kennedy Mining Company in making an application for a patent to the Kennedy Mine, Lot No. 44. It has nothing to do with this case. Our ownership of the Kennedy Mine

has nothing to do with the case. The contest is between the Pioneer and the Silva.

The third objection on page 67 brings up this question of the surface conflict.

THE COURT. Where is that, Mr. Wright?

MR. WRIGHT. Page 67, followed on page 68. There was a surface conflict between the Kennedy Mining Company and the Pioneer Mining Company. If your Honor please, this conflict covered the land between perhaps about this point (referring to the map) and about this point (referring to the map). The Kennedy Company, in other words, claimed the right to come down to this distance (showing on the map) and the Pioneer Company claimed the right to go northward to this distance (referring to the map); and therefore the Pioneer Company adversed the proceedings of the Kennedy Mining Company in the Land Office.

The So-Called Compromise Agreement.

The fourth objection goes to the introduction of this agreement in writing, which is found in Finding VIII on page 25. I will read this:

(Reading) "In the matter of the applications respec-
"tively of the Pioneer Gold & Silver Mining Company
"and the Kennedy Mining Company for patents to Quartz
"Mining claims.

"Whereas, the above named corporations have respec-
"tively filed applications in the United States Land Office
"at Sacramento, for patents to quartz mining claims in
"Amador County, California, from which it appears that
"there is a conflict of claim to a portion thereof;

"And, whereas, the said corporations have mutually "adjusted, settled, and compromised such conflicts of "claims;

"Now, therefore, in consideration thereof, these pres- "ents witnesseth, that the Pioneer Gold & Silver Mining "Company withdraws from its application as aforesaid "any claim to the northern portion of the quartz lode or "lead and surface ground therein described and embrac- "ing forty feet and six inches, to-wit:"—

It is this segment of ground that the Pioneer Company withdrew from, 40 feet and 6 inches to the south (counsel refers to map and thereupon continues reading):

"Beginning at the Live Oak Tree, the point of com- "mencement mentioned in said application, and extend- "ing thence south the aforesaid 40 feet and 6 inches. "And the Kennedy Company abandons all claim to any "portion of the said quartz lode or lead and surface "ground, south of the point where such extent of 40 feet "and 6 inches shall terminate.

"And the dividing line between the claims of the "respective companies shall be one drawn at right "angles with the general course of the lode or lead, and "surface ground thereto appurtenant, and at the point "hereinbefore designated, to wit, where such extent of "40 feet and 6 inches shall terminate."

Now the language of this "compromise agreement," as it is called, is that the Kennedy Company "*abandons* all "claim to any portion of the said quartz lode or lead and "surface ground south of the point where such extent of "40 feet and 6 inches shall terminate."

This compromise has been brought into this case as though it were necessarily a muniment of title; as though this act of abandonment on the part of the Kennedy Min-

ing Company was an act of the paramount owner of the land, whereas it was nothing but an abandonment of whatever claim it had.

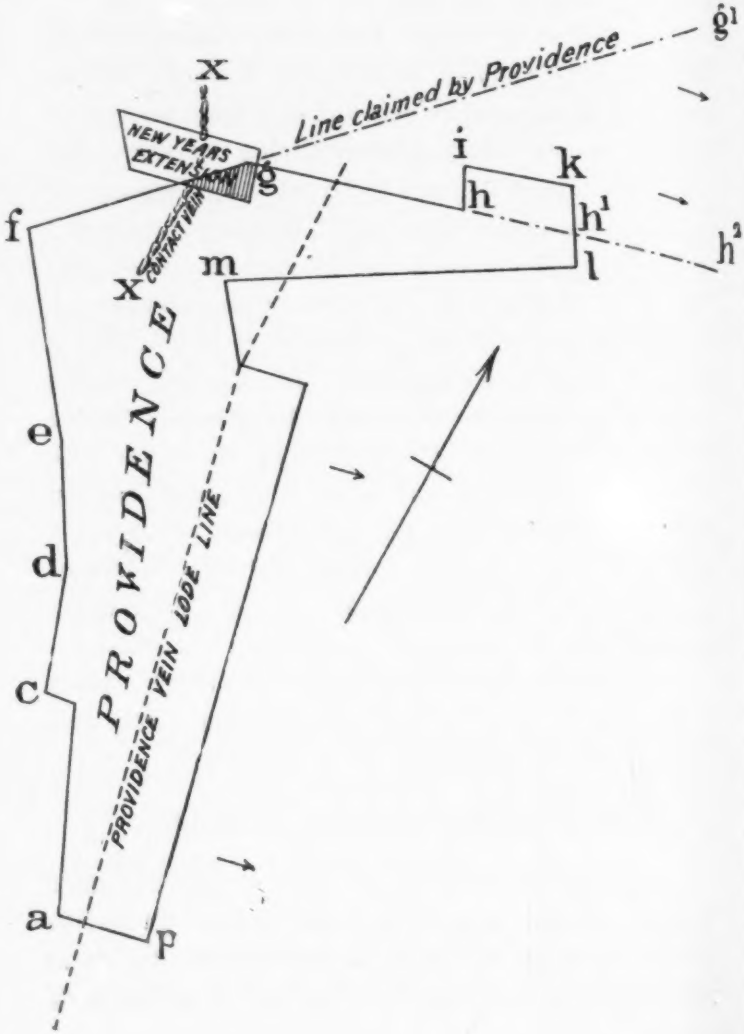
Abandonment to whom? Not to the Pioneer Gold & Silver Mining Company, because the Kennedy Mining Company did not own the land and so it could not convey it to the Pioneer Gold and Silver Mining Company. All it could do was to do just exactly what the language of the compromise agreement said. It could "abandon" the land and it did so to the government necessarily, leaving the Pioneer Gold and Silver Mining Company to deal individually with the government as to that part of the land which was abandoned. The Kennedy Mining Company did not concern itself, the Kennedy Mining Company, I say, did not concern itself afterwards with what the Pioneer Gold and Silver Mining Company did in its transactions with the government. That was a matter between the government and that company. After it had abandoned the land, it was no concern of the Kennedy Mining Company.

Now the Courts have dealt to some extent with matters of this sort. I think we have sufficient light on the subject to enable us to reach a correct conclusion.

The Providence—Champion Compromise.

During the progress of the proceedings of the Champion Mining Company in its application for a patent for the New Years Extension Mine, we find a state of facts as shown on this little map (showing as on Diagram S).

Diagram S.


x
Line claimed by Providence
g¹
NEW YEARS EXTENSION
g
i
k
h
h¹
h²
l
f
x
CONTACT VEIN
m
PROVIDENCE
PROVIDENCE VEIN LODE LINE
e
d
c
a
p

There was a conflict between the New Years Extension, a conflict of location, between this New Years Extension and the Providence Mine. The Providence was already a patented mine. Eventually, a line was agreed upon between the parties and it was this diagonal line (referring to line f—g on map).

MR. LINDLEY. I don't know that it was at all material that there was an agreement, because there was an amended location filed.

MR. WRIGHT. I will get to that later. (Referring to line f—g on map.) Here is the line that was agreed upon. The matter was settled by an abandonment upon the part of the Champion Mining Company, the company owning on the north, just as in the case at bar; and the Providence Mining Company here (showing on the map) on the south, has from that time forward and until the recent decision of that case, the Providence case, by the Supreme Court of the United States, claimed that this line that I indicated a moment ago and now with my finger again, was the line that bounded the rights of the parties, not only as to the surface of the ground but as to the lode. Can your Honor see the map distinctly?

THE COURT. Yes, I can see the lines.

MR. WRIGHT. In the back end of my "post-mortem argument," as Judge Lindley terms it, there is a sketch of it; but perhaps Judge Lindley's little map illustrates it better.

MR. LINDLEY. That is Judge Hawley's map; it is not my map; it is found in Judge Hawley's opinion.

MR. WRIGHT. It is your map all the same. As I said a moment ago, in that case, as in the case at bar, the Providence Company claimed title to this triangular piece of ground, to the triangular piece of ground lying between this line and this line (showing lines g—g^1 and g—h^2 on the map)—the lode on its dip extending in this direction (showing as in the direction of the arrows on Diagram 8)—and all that portion of the lode lying between those two lines, by virtue of this abandonment.

Now let us see what the several courts did with this question.

In Walrath v. Champion Mining Company, 63 Fed. 552, 558, Judge Hawley says:

"The abandonment, which is binding upon it,"—that is, upon the Champion Company—"was to any and all lodes "within the surface boundaries of the Providence loca- "tion and survey; but this abandonment or agreement "or whatever it may be called, did not give to the Provi- "dence any greater rights than it previously had. The "acquiescence and agreement between the parties "amounted to nothing more than a recognition of both "parties that the line f—g was the boundary line be- "tween the two companies."

This was affirmed in Walrath v. Champion Mining Company, 72 Fed. 978.

In Walrath v. Champion Mining Company, 171 U. S., (the page I don't know)—I handed the decision to your Honor yesterday—it is said concerning the same matter:

"In the notice of re-location, however, the northerly "line of the Providence is called the south end line of "the re-located ground. The description is as follows:"

(Here follows the description.) "It is hence contended "that if the f—g is the southerly end line of the New "Years Extension it must necessarily be the northern "end line of the Providence Mine. This does not follow "nor is there any concession of it."

Here is exactly the same claim that is made in the case at bar. This line is the south end line of the Kennedy Mine (referring to map) as we admit, and it is contended that therefore it is the northern end line of the Pioneer Mine throughout the entire extension of this line.

The Court says: "This does not follow, nor is there "any concession of it. Coincidence of lines between "claims does not make them side lines or end lines. "Whether they shall be so regarded depends upon the "legal considerations which we have already sufficiently "entered into and need not repeat."

In other words, the Court means that each of these patents stands alone; it is a separate and distinct title in itself. It is a separate grant from the government, and it must stand or fall alone. The mere fortuitous fact that the north end line of the Pioneer is coincident physically, not legally, with the south end line of the Kennedy Mine to that extent, to the extent of its length, in no sense makes the titles the same. In other words, there is no partnership between these companies, and there never was.

The Court then proceeds to say, however: "We do not "say that there may not be an agreement settling end "lines. One example of such an agreement was exhibited "in Richmond Mining Company v. Eureka Mining Com- "pany, 103 U. S. 839."

And now we come to the famous Eureka compromise line.

(*At this point a recess was taken until 2 o'clock P. M. of the same day, when Mr. Wright resumed his argument as follows:*)

The Eureka—Champion Compromise Line.

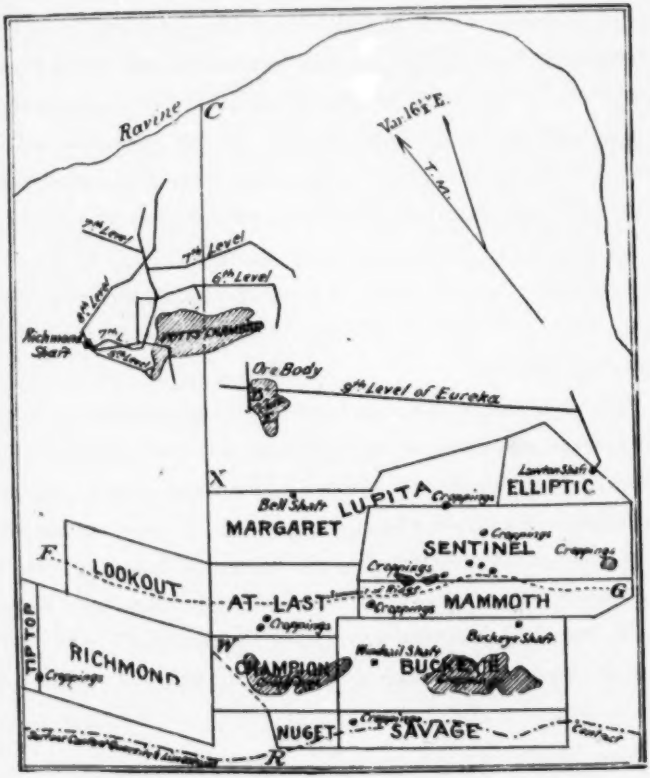
If your Honor please, we too have had made a map of the Eureka claims. The map is taken from the exhibit printed with the case in the 4th Sawyer and with all the reports of the case, and the directions are exactly opposite to what they are in the map that hangs behind us here, used by Mr. Lindley. (Exhibits Diagram P.)

MR. LINDLEY. The map is turned around, that is all; I turned the map around simply to show—

MR. WRIGHT. (Interrupting) If your Honor please, I have had colored in pink, blue and yellow the patents which formed the basis of the discussion by the Courts in this case, that is, the Circuit Court and the United States Supreme Court. The Champion, the At Last and the Margaret or Lupita belonged to the Eureka Company (referring to map). The Richmond and the Lookout are about the only ones particularly referred to in the decision, belonging to the Richmond Company. The compromise line was from "W" at this point (referring to the map) to this point "C" (referring to the map).

Now, in the Eureka case, as shown by both the decision in the Circuit Court, 4th Sawy. 302, 326, and the

Diagram P.


Ravine
C
Var 16½° E.
T. M.
7th Level
7th Level
6th Level
6th Level
Richmond Shaft
7th L
6th Level
Ore Body
9th Level of Eureka
X
Bell Shaft
LUPITA
Croppings
Lawton Shaft
ELLIPTIC
MARGARET
Croppings
SENTINEL
Croppings
Croppings
F
LOOKOUT
AT LAST
Croppings
MAMMOTH
G
TIP TOP
RICHMOND
Croppings
W
CHAMPION
Windmill Shaft
BUCKEYE
Buckeye Shaft
NUGET
Croppings
SAVAGE
R

decision in the Supreme Court of the United States, 103 U. S. 839, when the Eureka and Richmond Companies entered into their compromise agreement, they actually owned the property they undertook to divide.

The compromise appears to have been based upon the ownership—I submit this case to your Honor's closest analysis for this conclusion—that the compromise appears to have been based upon the ownership of the Champion claim by the Eureka company and of the Richmond claim by the Richmond company. And in passing, I may say to your Honor that for all the purposes of the Eureka case, the entire case could have been and substantially was decided upon the ownership by the Eureka company of the Champion claim alone.

I submit this confidently to your Honor and ask that your Honor analyze the case with the closest attention you can give to it.

This entire case, both as to the end line question and as to the compromise line, was substantially decided in both courts upon the ownership by the Eureka company of the Champion claim alone, a claim which, as shown upon this little plat (showing) had parallel end lines, and about the ownership of which there could be no dispute. There never was any question as to the ownership of the surface nor of the minerals underlying the surface, nor as to the extra-lateral right.

Now in 4th Sawyer, page 326, it is said:

"As the Richmond and the Champion were vein or lode "claims"—I know the popular idea of this case is, if

your Honor please, that the compromise line was drawn, or, rather, approved by the Court, between a large number of these claims, but we must look to the decision itself and the decision says:

"As the Richmond and the Champion were vein or lode "claims, a line dividing them must be extended along the "dip of the vein or lode, so far as that goes, or it will not "constitute a boundary between them."

And the Supreme Court say as to the same matter, in Richmond v. Eureka, 103 U. S. 839:

"The Eureka had already got its patent for the Cham- "pion claim, which must have been older than the Rich- "mond, for the Richmond location was bounded on the "Champion and by this patent was permitted to follow "throughout their entire depth all veins, lodes, ledges and "deposits, the tops or apexes of which came to the sur- "face within the lines of its survey."

Here, if your Honor please, is a clear exposition of the title of the Eureka company without reverting at all to any compromise or to the ownership of the At Last or to the ownership of the Margaret or Lupita; consequently, in a sense, every thing in this case as to the compromise line, and every thing as to the Margaret and as to these other titles, is *obiter dictum*. It follows as the night the day. This case is decided on the lines I have just read, inevitably. I will repeat the language, with your Honor's permission:

"The Eureka had already got its patent for the Cham- "pion claim, which must have been older than the Rich- "mond, for the Richmond location was bounded on the

"Champion, and by this patent" (the Champion) "was "permitted to follow throughout their entire depth all "veins, lodes, ledges and deposits, the tops or apexes of "which came to the surface within the lines of its sur- "vey."

Suppose the decision had stopped right there, would not the practical results to the parties in suit be exactly the same as followed? Would this great confusion that has followed from attempts to distort, to improperly explain, the Eureka case, would any of these things ever have followed? The case was decided before any of these much confused questions were reached.

I read further:

"It is evident, also, that the Richmond company was "seeking a similar patent for its Richmond claim, as by "the terms of the settlement the Eureka was to with- "draw its opposition, and in due time such a patent was "obtained."

Not as in the case at bar, if your Honor please, not a claim with diverging end lines, but the Richmond Company procured a patent to exactly what was contemplated when the compromise agreement was entered into. It procured a patent square up to the line, and between that line and a line parallel at the other end of the claim. It actually secured its patent and then the two companies owned, the one up to one side and the other up to the other side of this so-called compromise line.

(Reading from the Supreme Court decision) "The "Eureka Company also pushed forward its applications "for patents to its other claims and in the end got them

"all in the same form and with grants of the same privileges. In this way the companies secured from the United States the right to work the entire metal bearing rock from the quartzite to the shale between the end lines of their patented surveys, extended downwards and following the dip of the mineralized limestone zone. Their patents are all alike, and their rights under them the same, save only that the Eureka is confined in its operations to the south-easterly side and the Richmond to the north-westerly side of the agreed line."

In other words, the Eureka Company, by means of its patent to the Champion Mine, already had a complete title to the property awarded to it by the compromise, while the Richmond Company proceeded to patent the Richmond claim in such a way as to perfectly secure all the property awarded to it by means of the compromise. The compromise was upheld by both the Circuit Court and the Supreme Court on the ground that the owner of the apex owned the lode, and that, inasmuch as the apex was within the Champion and the Richmond mines, the titles to which were unquestioned, ownership of the apex enabled the two companies to divide the lode to its greatest depths.

As I said before, this would have been the case if there had been no compromise.

There can be no doubt, however, that a different decision would have been reached if either of the parties had abandoned, or in any other manner had failed to secure, any portion of the title awarded to it by the compromise agreement.

In such case, the doctrine of Walrath v. Champion,

which I have already quoted, would have applied, namely, that the abandonment of a claim of title by one party does not confer title upon the other.

Defendant's Theory as to the Pioneer--Kennedy Compromise.

In the case at bar each party abandoned its claim to a certain portion of the lode and adjacent surface ground in dispute, leaving the other free to secure title to the abandoned property by independent dealings with the government.

And defendant here claims that the predecessor in interest of the plaintiff company neglected to take the proper steps to secure the property thus abandoned by the defendant's predecessor in interest, thus leaving it open to a new location by any third party or by even the defendant's predecessor itself. That is to say, after the Pioneer Gold and Silver Mining Company had secured what it did by its patent, even the old Kennedy Mining Company could have located over here on the dip (referring to the map) and could have acquired a title to the dip and that without any breach of any contract between it and the Pioneer Gold and Silver Mining Company. And this for the reason that it would be strange indeed if the status of this great lode should be held perpetually suspended at the mere caprice, or mistake, if you please, of the plaintiff's predecessor, after the latter had failed to secure title to it when it had the opportunity.

And so, when the Silva ground was located by third

parties and afterwards sold and patented to the Kennedy Mining and Milling Company, the title thus subsequently acquired was good, not only against the government, but against all the world, including the plaintiff's predecessor in interest.

The same result could not be claimed in the Eureka case, because, as shown by the Supreme Court, both parties carried out their agreements and secured perfect titles to all the property it was intended by the compromise agreement they should respectively secure.

The Del Monte—Last Chance Compromise.

Now, if your Honor please, the rule for which we contend was followed in its entirety by Judge Hallett in Del Monte Min. & M. Co. v. New York & Last Chance Min. Co., 66 Fed. 213, where he says—I will hand this memorandum to your Honor. I wrote this out because it is such an important point and it has been so much talked about that I want to be perfectly certain of my language. I quote from the case:

"Some years back, and before patents were obtained, "these locations" (the Last Chance and New York) "were held by different owners, between whom a contro- "versy arose as to the ownership of the territory common "to both locations. Upon the application of the owners "of one of the claims for patent, the owners of the other "claim made adverse claim in the Land Office, pursuant "to the Act of Congress governing such matters."

Just as it is in this case at bar.

"Thereupon the controversy was renewed in court and "was there pending for a considerable time without "trial or judgment. The parties then came to an "agreement by which the New York location was "allowed to patent the greater part of the terri- "tory in dispute, as indicated on the diagram, and "the New York and Last Chance Mining Company, "respondent in this suit, was organized to represent the "parties respectively, and the ground in dispute was con- "veyed to respondent in settlement of the controversy. "A title so arising may, it is said, be referred to one or "the other or both of the contending locations, and "respondent may follow the end lines of one or the other "location in its election. This, however, cannot be ac- "cepted. As respondent's territory was patented under "the New York location, the lines of that location must "control all questions of ownership. *The controversy prior "to patent is of no weight whatever as to any right arising "under the patent for one claim or the other.*"

Permit me to repeat the last language: "THE CON- "TROVERSY PRIOR TO PATENT IS OF NO WEIGHT "WHATEVER AS TO ANY RIGHT ARISING UNDER "THE PATENT FOR ONE CLAIM OR THE OTHER." And that is precisely our contention here, that the patent must stand or fall by itself.

Now, it is true this rule was not directly mentioned by the United States Supreme Court in Del Monte Mining & Milling Company v. Last Chance Mining & Milling Company, 171 U. S. 55, but it was taken as a matter of course and acted on, the Court considering nothing but the patents in determining the rights of the parties.

Throughout that whole great case, occupying page after page of the reports, there is not one reference to any compromise line, nor to anything antecedent to the patents nor to anything whatever excepting the patents themselves.

Ante-Patent Proceedings Cannot be Considered. The Doe—Waterloo Case.

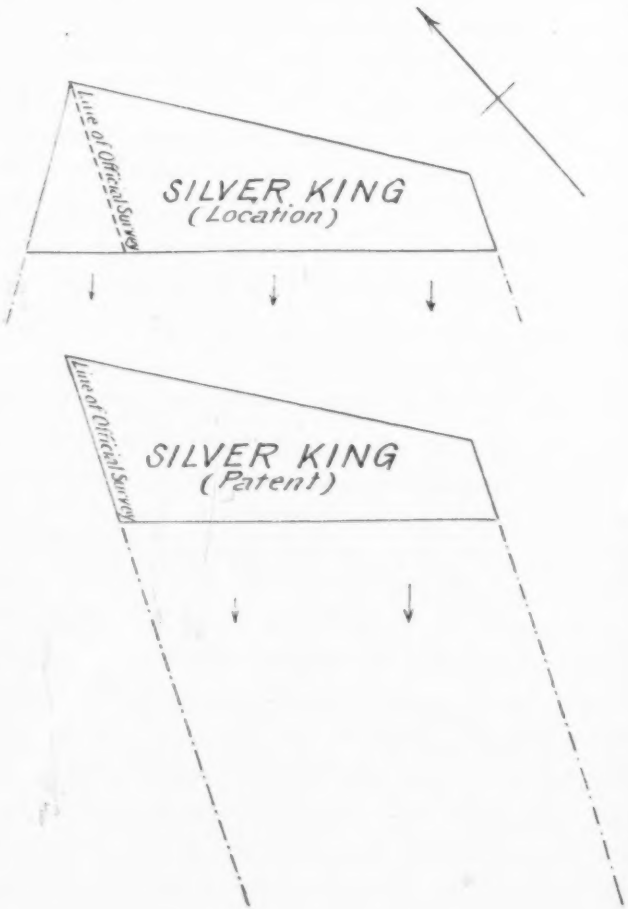
There is another important case which throws light upon this same question, and I have made some excerpts from it to apply on another branch of the case, but as they so well illustrate this point, I think I will read them here, and I may say that I read them also in response to a question asked by Judge Lindley this morning. I think the remark was in the form of a question as to what right or authority or power a mere surveyor could exercise in establishing the rights of a party under a patent to be obtained upon his survey. I answer him here and now. The surveyor has everything to do with it. *When the applicant adopts the survey and goes into the Land Office with it and becomes a party to it, the United States being the party on the other side, the law, if your Honor please, is that the surveyor is the agent of both parties, the claimant and the government,* and I shall show that in due time.

(Here counsel produces Diagram F[1]).

Now, if your Honor please, the diagram at the top represents the shape of the Silver King mine as it was located. This, I may say in passing, is one of the mines that was litigated in the great case of Doe v. Waterloo, first taken to the Supreme Court of the State of California under the name of Doe v. Sanger, and afterwards taken to the Circuit Court of the United States and carried up.

Now, this is the shape (referring to Diagram F[1]). The end lines diverge. The dip of the lode is in this direction

Diagram F[1].


Line of Official Survey
SILVER KING
(Location)
Line of Official Survey
SILVER KING
(Patent)

(showing) downward. I think the distance between this point (showing) and this point (showing) is two hundred and fifty-nine feet. There was this considerable divergence between the end lines, and Mr. Dunlap, the surveyor, was requested to survey the claim for patent. In doing so, he drew the end line in, that is, this end line (showing on diagram) in order to make it parallel with the east end line, so that this line was a line that was made by the surveyor without either the direction or even the permission of any one. The owners of the property refused to accept the survey, and ignored the matter entirely. Later on they sold the property to other parties, who adopted the survey and proceeded to patent the claim.

In the United States Court, Judge Mesick and my associate Mr. Waters contended in that case that inasmuch as the end lines of the location—and we in the case at bar hear a great deal about location and very little about patents, as though the effect of the location were conclusive from its date—I say they contended that inasmuch as the location was made without parallel end lines, therefore no extra-lateral right attached.

Judge Ross handled the question, I think once and for all, and he says, in Doe v. Waterloo, 54 Fed. 935:

"In the original location of the Silver King, as has "been said, the end lines were not parallel, there being a "divergence of 259 feet at the south-west corner, in the "direction of the dip of the ore bodies; and, that being "the case, it is earnestly insisted on the part of the com- "plainant that the defendant has no right to follow any

" vein, lode or ledge having its apex within the surface
" lines of the Silver King, outside of the side lines of that
" claim extended vertically downward; that whether or
" not the extra-lateral right conferred by the statute
" exists depends entirely upon the fact whether or not
" the end lines as originally located were parallel, and
" that for that purpose regard cannot be had to the lines
" of the claim as patented by the government. The cases
" of Iron Silver Mining Company v. Elgin Mining &
" Smelting Company, 118 U. S. 196, and Mining Com-
" pany v. Tarbet, 98 U. S. 463, are relied upon as conclu-
" sively sustaining that position. Those cases undoubt-
" edly determine that a locator is bound by the lines of
" his surface location; and the former further determines
" that where, as in the present case, the location was
" made after the passage of the Act of May 10, 1872, it is
" 'essential to the existence of any right in the locator
" 'or patentee to follow his vein outside of vertical planes
" 'drawn through the side lines,' that the end lines of
" such surface locations be parallel. But by neither of
" those cases, nor by any other case that has been cited,
" has it been determined that, where the end lines of the
" surface location as fixed and declared in the govern-
" ment patent are parallel, the extra-lateral right given
" by the statute can be defeated by showing that accord-
" ing to the original location of the claim, such surface
" end lines were not parallel. If the rights conferred by
" the patent can be defeated by showing a want of par-
" allelism of the end lines in the original location, it is
" difficult to understand why the patent may not likewise
" be defeated by showing that the original location was
" void because its boundaries were not properly marked
" upon the ground, or because no vein, lode or ledge was
" discovered within them, or because the statutory re-
" quirement in respect to the posting of the notice of lo-
" cation was not complied with, or because of an omis-
" sion on the part of the locator to comply with any other
" provision of the statute regarding the location of such

"lode claims. All such matters I understand to be ab-
"solutely concluded by the patent so long as it stands
"unrevoked. If questions relating to the boundaries of
"the location, the marking of them, the discovery of a
"vein, lode or ledge within them, the posting of the re-
"quired notice, etc., are open to contestation after the
"issuance of a patent for the claim as before, the issu-
"ance of such an instrument would be a vain act and
"would wholly fail to secure the patentee the rights and
"privileges designed by the law authorizing its issue.
"The very purpose of the patent is to do away with the
"necessity of going back to the facts upon which it is
"based. Authorities to this effect in both federal and
"state courts are so numerous as to render it, I think,
"unnecessary to cite them.

"The patent in question was based, as has been said,
"upon a survey made in 1882 by United States deputy
"surveyor Dunlap, upon the request of Warden and his
"associates, and they rejected it because the draw-
"ing in of the southwest corner of the claim as originally
"located, in order to make the end lines parallel, left out
"of the claim a triangular piece of ground. But they sub-
"sequently in 1884 conveyed their interest in the
"entire claim to Bradley and his associates, and
"those purchasers adopted the survey as correctly
"representing the boundaries of the claim, and
"after causing the surveyor to again go over the
"boundaries and lines of his survey, made appli-
"cation to the government for the purchase and patent
"of the whole claim according to these monuments and
"boundaries; and it was upon such survey and applica-
"tion that their grantee, the defendant here, was per-
"mitted to enter the claim and upon which the patent
"was based. The lines of the claim as surveyed by the
"surveyor were plainly marked on the ground, and the
"monuments which marked them were thus adopted by
"the owners of the claim as correctly defining its
"boundaries. *No rights of third parties having inter-*
"*vened, it surely could not have been necessary for the*

*"owners to take down the monuments that marked the "lines and erect them over again. The drawing in of the "southwest corner of the original location in order to "make the end lines parallel, and which change was thus "adopted by defendant's grantors and by defendant, did "not take in any ground not included in the original loca- "tion. It did not take anything that belonged to any one "else; on the contrary it left out of the claim a triangular "piece of the ground. No good reason is perceived why "the lines of the claim could not be thus changed so as to "comply with the statute requiring the end lines to be "parallel, nor any reason for holding that a patent based "upon such a survey is not conclusive upon the government "as well as the patentee as to the boundaries of the claim; "and if conclusive upon the government so also upon any "of its grantees acquiring rights subsequent to those of "such patentee. * * * *"*

"Holding as I do that the patent is conclusive evidence "as to the true location of the Silver King claim, and as "the end lines of that claim as thus established are par- "allel, the right on the defendant's part to pursue any "vein, lode or ledge having its apex within those surface "lines in its downward dip outside of the side lines of "that claim extended vertically downward, and within "vertical planes drawn down through those patented "end lines continued in their own direction, follows "whether effect be given to the express grant of that "right contained in the patent or not; for the statute "itself gives it. Revised Statutes 2,322."

Now I have read this long quotation because it answers so many questions and supports so many propositions raised by our objections that it does away, perhaps, with the necessity for arguing each of these in detail.

Review of Objections, Continued.

If your Honor please, this question of the compromise line is brought up at a later stage in these objections.

When we come to take up the objections to the issuance of the patent to the Pioneer Company, the same argument applies there as applies here, where the matter refers to the patent of the Kennedy Mine.

When I come to that objection, probably I shall not repeat this argument, and perhaps I shall say nothing on that particular subject.

I think that what I have said and what I have quoted sustains the fifth objection, as to the direction given to William L. McKim to survey the Kennedy mine; also the sixth objection, as to the fact that he made a survey of the claim and that that survey was approved. I am now referring to the Kennedy Mine, Lot No. 44.

Now, these objections to these matters, and I may say to all matters referring to the Kennedy Mine, including the Kennedy patent, are made in good faith, because these matters are absolutely irrelevant and immaterial to any of the issues in this case, the elements of the dispute being the facts, as I stated at the outset, that we have gone under our own ground, the Silva ground, and taken out ore which plaintiff claims by reason of its claim of ownership of the dip right, and the third element being that we have sunk a shaft over here (referring to map). As I said in the beginning, it matters not whether it was made on our ground or on somebody else's ground; it was merely the means of reaching the ores in dispute.

It is hardly necessary to repeat the second reason for this objection after the authorities I have read.

(Reading from page 69 of the printed record in 1408):

"(*b*) All and singular each and every the facts so ob-
" jected to are incompetent as evidence to limit or enlarge
" or explain or anywise to control or modify or affect the
" terms or provisions or legal effect of the patent issued
" to said Kennedy Mining Company for said Kennedy
" Quartz Mine, Lot No. 44, on July 29, 1872, as shown by
" paragraph I of said agreed statement."

Then the next reason stated—we do not particularly rely upon it—is stated in the objection itself.

(Reading further from page 69 of the printed record in 1408):

"(*c*) All and singular each and every the facts so ob-
" jected to, relate only to the surface area to be embraced
" within said Kennedy Quartz Mine, Lot No. 44, and in
" nowise relate to any extra-lateral right claimed as
" attaching to said Kennedy Quartz Mine, Lot No. 44, nor
" to any right or interest in any part of any lode or lodes
" lying outside the vertical boundaries of said Lot No. 44."

Now, we say as to this, that the end lines themselves, as fixed by the patent, determine the extra-lateral right or the want of it. That is all that it is necessary to say upon that point. If they proceeded to patent with end lines that gave them no extra-lateral right, they did not get it by reason of the compromise, in any way, shape or manner. All we could do was to withdraw from the ground.

The Defendant a Stranger to the Compromise.

The next reason given is more important. This agreement, that is, such as it was, was made between a party a stranger to this suit, and the Pioneer Gold and Silver

Mining Company, the predecessor of the plaintiff in interest.

(Reads further, from pages 69 and 70 of printed record in 1408)

"(*d*) The agreement as to the common boundary line "between said Kennedy Quartz Mine and the Pioneer "Quartz Mine, set out in paragraph VIII of said agreed "statement, is not recited nor referred to in said patent "to said Kennedy Quartz Mine, nor was said agreement "ever recorded in the office of the County Recorder of the "County of Amador, State of California, in which said "Kennedy Quartz Mine is situate, nor is it alleged in the "complaint herein that this defendant was a party to "said agreement, nor that this defendant ever had any "notice or knowledge of the existence of the same at the "time it acquired its title to the Silva Quartz Mine, Lot "No. 86, the patenting of which is shown by the facts set "forth in paragraph XXVIII of said agreed statement."

I think there is "meat" in this objection, but I do not think it is necessary to argue it. It speaks for itself, and in fact, counsel upon the other side practically concedes the force of it as stated.

Defendant does not Claim the Disputed Ores Under its Kennedy Mine Title.

The next reason amounts to simply an allegation of our ownership of the ore by virtue of our ownership of the Silva Mine. Therefore, it is not necessary to repeat it, but we wish to say at this point, once and for all, a thing that has been stated throughout this entire case wherever the matter has come up. It is in the stipulation of facts as well

as in these objections, repeated many times, that this defendant does not, in any way or manner, claim any title to any of these ores, either to the ores that were taken out south of the Kennedy line extended and within the Silva ground or to the ores taken out of the Volunteer ground, by reason of its ownership of the Kennedy Mine. The Kennedy Company claims nothing by virtue of its ownership of the Kennedy Mine, Lot No. 44, south of the south end line of the Kennedy Mine extended in its own direction easterly, but in all the debates on this subject with counsel on the other side, I have been unable to disabuse his mind of the idea that we are in some way or manner claiming that.

I would like to have it settled that for no purpose whatever in this case, has it ever been claimed or is it now claimed or will it ever be claimed that we went into these disputed ore bodies by virtue of our ownership of the Kennedy Mine.

So far as these ores in suit in the first case, No. 1179, are concerned, at the time they were taken out, the property—this Volunteer Mine—(showing as on Diagram Q) was owned by a man named Meehan. When he sold the Volunteer Mine to the Argonaut Company, he did not, so far as the record discloses nor so far as I have any knowledge or belief on the subject, sell any right of action he might have claimed against the Kennedy Company for taking out this ore; and, therefore, so far as this ore is concerned, it is practically just the same as though it had been on government land—as though we had taken it out

under our right by virtue of the first section of the Act of May 10, 1872, which allows us to mine on any government land wherever we please, so long as we do not get into any body else's ground. Of course the same rule obtains there in 1179 as here in 1408, that the plaintiff, if it recover at all, must recover on the strength of its own title.

Now, we have a second set of objections, the first of which refers to the Kennedy patent. Objection 7 on page 71 (referring to the printed record in 1408) refers to the Kennedy patent, which is set forth in *haec verba* in the agreed statement of facts. We say that that is all irrelevant and utterly immaterial to the issues of this case. No matter what the Kennedy Company got or did not get in any way by its patent, the Argonaut Company does not claim what the Kennedy Company got by reason of its patent to Lot No. 44.

The next objection is merely as to the transfer of the rights obtained by the Kennedy Mining Company, to the Kennedy Mining and Milling Company. It is no concern of the Argonaut Company whether that was a transfer to us or not. It is immaterial to every issue in this case.

The gist of our objection appears in reasons "c" and "d" on page 72 (reading):

"(c) Plaintiff cannot establish a title in itself to the "ores in dispute in this cause by showing that the de- "fendant has no title nor right to said ores by reason of "its ownership of the Kennedy Quartz Mine, nor by "showing the limitations of the patent to said Kennedy "Quartz Mine, but plaintiff must rely upon and clearly "show its own title to said ores; and,

"(*d*) Defendant claims title to the ores in dispute in "this cause by reason of its ownership of said Silva "Quartz Mine, Lot No. 86, and not by reason of its owner- "ship of said Kennedy Quartz Mine, Lot No. 44."

All these things are irrelevant and immaterial and the same reasons exactly apply to the representations of the Kennedy Mine in the plat "Exhibit A" and to every reference to it upon this map. This map (referring to "Exhibit A" in printed record in 1408) should, in my opinion, be cut down so that there would be nothing on it except the Pioneer, the Silva and our shaft.

The same as to objection 10: "All and singular each "and every the facts set forth in paragraph XVIII of said "agreed statement, in so far as such facts show or tend "to show the southern end line of said Kennedy Quartz "Mine and the coincidence of the northern end line of "said Pioneer Quartz Mine with a part of the southern "end line of said Kennedy Quartz Mine."

This has all been sufficiently debated and has been all decided, as I think, by the remarks of Mr. Justice McKenna in the case of Walrath v. Champion, which I have already quoted.

Also it is entirely irrelevant and immaterial to every issue here as to whether or not the Kennedy Company has a vein in its mine, as found in paragraph XX of the agreed statement.

Objection XI goes to that point: "All and singular "each and every the facts set forth in paragraph XX of "said agreed statement, in so far as such facts show or "tend to show the existence of a ledge of rock in place

"bearing gold within said Kennedy Quartz Mine, Lot No. "44, and the nature and extent of said vein within said "Kennedy Quartz Mine."

That is all totally irrelevant and unnecessary here.

(Reading) "Twelfth. All and singular each and "every the facts set forth in paragraph XXI of said "agreed statement, in so far as such facts show or tend "to show the existence and course of a vein in said Ken- "nedy Quartz Mine, Lot No. 44, and that said vein crosses "out of said Kennedy Quartz Mine into said Pioneer "Quartz Mine."

The questions before this Court are: Is there a vein in the *Pioneer* Mine? How does it lie, within *that* mine? Does it come up to the end lines of the claim or does it come up to one end line and go out of one side line?

These are the matters to be determined, what sort of a vein there is within the *Pioneer* Mine and not what kind of a vein there is within the Kennedy Mine.

The same remarks apply to objections 12, 13 and 14 on pages 73 and 74. The matters therein referred to are simply irrelevant and immaterial and incompetent to prove anything in this case alleged, or denied or agreed upon.

The 15th objection on page 75 brings up these ante-patent proceedings of the Pioneer Company. I do not care to argue this in detail, as I think I have said sufficient on that subject.

The same as to the 16th objection.

The same as to the 17th objection, referring to the compromise agreement.

The same as to the 18th, referring to the directions given to the deputy surveyor to make a survey of the Pioneer.

The same as to the 19th, showing the return of the survey.

I think at a later period of this discussion I may refer to some extent to this matter. It is claimed by counsel upon the other side that these matters are relevant and perhaps, as a matter of safety, I ought to discuss them to some extent, but not at this time, because it will save time for me to present my views on this particular subject in connection with other matters.

The same remarks refer to the 20th objection on page 76. It has been fully discussed.

Defendant Denies Plaintiff's Claim of an Extra-Lateral Right.

We now come, if your Honor please, to the principal matter in this case, the Pioneer patent. Probably the time has now come when we should state to your Honor the reasons why we are confident that no extra-lateral right whatever attaches to this property, in order that there may be no mistake about our position in this case.

We say here that: while we admit the plaintiff's ownership of that entire segment known as Lot No. 48, that segment on the surface of the earth and extended down to the center of the earth, and to all the lodes within that segment, that is, between vertical planes drawn down through the boundaries of that segment; we have denied

in the pleadings and we deny here that under the law and the facts, under this patent, the plaintiff has any extra-lateral right whatever. And I may say further that we do not state this proposition tentatively and uncertainly, but, your Honor, we state it with the fullest confidence in its soundness, and in the full belief that your Honor will adopt our views as the law in this case. We are not entering upon an uncertain discussion.

The Controlling Sections of the Statute.

It is true, as stated by counsel on the other side, that an entry of Lot No. 48 was made and had in February, 1872; but it is also true that this claim was patented more than three months after the Act of 1872 was passed.

I will read first to your Honor, Section 3 of the Act of 1872, which has gone into the revised statutes as Section 2322.

This section says: (reading) "The locators of all min-
"ing locations heretofore made or which shall hereafter
"be made on any mineral vein, lode or ledge situated on
"the public domain, their heirs and assigns, where no
"adverse claim exists on the 10th day of May, 1872, so
"long as they comply with the laws of the United States
"and with State, territorial and local regulations not in
"conflict with the laws of the United States governing
"their possessory title, shall have the exclusive right of
"possession and enjoyment of all the surface included
"within the lines of their locations"—that we concede—
(continuing reading), "and of all veins, lodes, and ledges
"throughout their entire depth, the top or apex of which
"lies inside of such surface lines extended downward
"vertically, although such veins, lodes or ledges may so

"far depart from a perpendicular in their course down-
"ward as to extend outside the vertical side lines of such
"surface locations. But their right of possession to such
"outside parts of such veins or ledges shall be confined
"to such portions thereof as lie between vertical planes
"drawn downward as above described through the end
"lines of their locations, so continued in their own direc-
"tion that such planes will intersect such exterior parts
"of such veins or ledges. And nothing in this section
"shall authorize the locator or possessor of a vein or lode
"which extends in its downward course beyond the verti-
"cal lines of his claim to enter upon the surface of a claim
"owned or possessed by another."

Now, this section says: "The locators of all mining
"locations heretofore made or which shall hereafter be
"made on any mineral vein, lode or ledge situated on the
"public domain, their heirs and assigns, where no ad-
"verse claim exists on the 10th day of May, 1872, *so long as*
"*they comply with the laws of the United States*," shall have
extra-lateral rights.

This morning, I think it was, counsel advanced the proposition that this was intended to apply to ALL LOCATIONS THERETOFORE MADE. I ask your Honor, and I ask him, whether he could advance such a proposition seriously? Does that mean a location made without authority of law? It is impossible that that could have been intended by this statute. A location is no location unless it is made lawfully, and therefore we must look into the law as it was before this statute was enacted, to see whether the claim in dispute here was made according to law, and whether its owners have complied with the statutes of the United States within the meaning of this section of the law.

This section of the law is our text; it furnishes the basis of our inquiry.

Is this one of the locations intended when it says, "the "locators of all mining locations heretofore made"? And have its owners "complied with the laws of the United "States"? These are the two questions which must be answered in the affirmative. It must be shown, first, that it is a legal location; and, second, that its owners have complied with the laws of the United States.

Section 2 of the act of 1872, which has passed into the revised statutes as section 2320, says:

"Mining claims upon veins or lodes of quartz or other "rock in place bearing gold, silver, cinnabar, lead, tin, "copper, or other valuable deposits, heretofore located, "shall be governed as to length along the vein or lode by "the customs, regulations and laws in force at the date of "their location. A mining claim located after the 10th "day of May, 1872, whether located by one or more per- "sons, may equal, but shall not exceed, 1500 feet in "length along the vein or lode; but no location of a min- "ing claim shall be made until the discovery of the vein "or lode within the limits of the claim located."

There are two classes of claims referred to in the prior portion of this section that I have just read. (Continues reading)

"No claim shall extend more than three hundred feet on "each side of the middle of the vein at the surface, nor "shall any claim be limited by any mining regulation to "less than twenty five feet on each side of the middle of "the vein at the surface, except where adverse rights ex- "isting on the 10th day of May, 1872, render such limita-

" tion necessary. The end lines of each claim shall be " parallel to each other."

Now we have three questions interjected into this discussion applying to this particular claim. First, was this such a location as was intended by Section 3 of the Act of 1872? Second, have they complied with the law involved in that section? And the third question is the cardinal question here, namely, whether it was necessary that the end lines of their claim should be made parallel and if so whether they have made those end lines parallel.

When a Patent May be Declared Void.

At this stage of the discussion, I think it is proper to state our views as to when a patent may be declared void, either in whole or in part.

Our position here necessarily involves the proposition that the statement of the extra-lateral right contained in the Pioneer patent is absolutely void, and this we claim. The Pioneer patent undertakes to convey 1589 $^{24}/_{100}$ linear feet of the Pioneer lode throughout their entire depth, without defining what particular segment of 1589 $^{24}/_{100}$ linear feet it was intended should be conveyed, unless such segment should be defined with reference to the south end line, the basic or initial boundary line. We don't think for a moment that they have any extra-lateral right defined with reference to any of these boundary lines. I merely refer to that as the only possible exception, their only possible chance.

Possibly, your Honor, it would be unnecessary to refer for this particular purpose to any case except the case known as the Elgin case found in 118 U. S., on page 196. There, as here, the patent recited the conveyance of an extra-lateral right. The recitation was as full and as complete as it is here. The objection was made in precisely the same way as it is made here. The parties owning the Stone claim undertook to go in under the ground of their opponents under claim of ownership of the dip of the Stone ledge. The testimony was objected to by the owners of the Gilt Edge claim, upon the ground that because of the surface form of the Stone claim, its owners had no right to pursue their lode outside of its surface lines extended vertically downward. That is precisely the legal position here. The owners of the Gilt Edge Mine claimed that the extra-lateral right recited in the patent to the Stone claim, was absolutely void, and the Court so held, so in that case we have an exact parallel.

MR. LINDLEY. Well, I beg your pardon for interrupting you. That case arose under the Act of 1872.

MR. WRIGHT. That is not the point I am getting at.

MR. LINDLEY. You say they are parallel.

MR. WRIGHT. If your Honor please, I am referring to the method by which such a matter as this is reached; it is merely a question of legal procedure.

MR. LINDLEY. I misunderstood you; I thought you said that the cases were exactly parallel.

MR. WRIGHT. I mean as to the procedure itself. And, as suggested by Mr. Waters, the parallelism is pursued in

respect of the fact that the extra-lateral right is actually named in the patent; so that, if the Land Office could have made conveyance of the extra-lateral right, it would have been good, just as here. If it had been within their power, it would have been a good conveyance.

I will hand your Honor this collection of authorities upon the questions as to when, where and under what circumstances a patent can be declared void, and as to the extent of the power of the Land Department of the United States to pass upon and decide jurisdictional facts.

These questions are discussed in this list of cases, which I will not recite.

(The following is a list of the cases referred to by counsel):

Rose v. Richmond, 17 Nev. 25;
Richmond v. Rose, 114 U. S. 576;
Whitney v. Taylor, 45 Fed. 616;
Francoeur v. Newhouse, 40 Fed. 623;
Polk's Lessee v. Wendal, 9 Cranch 87;
New Orleans v. U. S., 10 Pet. 662, 730;
Wilcox v. Jackson, 13 Pet. 498, 509;
Stoddard v. Chambers, 2 How. 284, 317;
Easton v. Salisbury, 21 How. 426, 428;
Reichert v. Felps, 6 Wall. 160;
Best v. Polk, 18 Wall. 112, 117;
Leavenworth L. & G. R. Co. v. U. S., 92 U. S. 733;
Newhall v. Sanger, 92 U. S. 761;
Sherman v. Buick, 93 U. S. 209;
Smelting Co. v. Kemp, 104 U. S. 636;

Steel v. Refining Co., 106 U. S. 447;
Railway Co. v. Dunmeyer, 113 U. S. 629, 642;
Reynolds v. Mg. Co., 116 U. S. 687;
Doolan v. Carr, 125 U. S. 624;
Railway Co. v. Whitney, 132 U. S. 357;
St. Paul Co. v. Northern Pac. Co., 139 U. S. 18;
Northern Pac. v. Cannon, 54 Fed. 252;
Lakin v. Dolly, 53 Fed. 333;
French v. Fyan, 93 U. S. 169;
Quinby v. Conlan, 104 U. S. 420;
Vance v. Burbank, 101 U. S. 514;
Gale v. Best, 78 Calif. 235;
Aurora Hill Con. Min. Co. v. '85 Min. Co., 34 Fed. 519.

I desire to read a few excerpts from these cases which will illustrate these points fully.

In Northern Pacific Railroad Company v. Cannon, 54 Fed. 252, the rule is stated as follows:

"The authorities upon this subject are to the effect "that, if the officers of the government *acted without* "*authority of law*, if the lands conveyed by the patent were "never within their control, or had been withdrawn from "their control, before the patent issued, then their acts "were void for want of power to issue the patent."

Now of course we do not dispute the right of the Land Department to make a conveyance of this as mineral land, nor was any such claim made in the Elgin case. The ownership of the segment of land bounded by the surface lines of the Stone claim, was never disputed, nor is the

same claim disputed here. The proposition is, that when an applicant goes into the Land Office and makes claim to a mine which is not properly shaped according to law, while it is true the Land Department may issue a patent to the land, it cannot grant the extra-lateral right in connection with that piece of land. The rule goes to this extent: Your Honor will remember in my reading from the case of Doe v. Waterloo, that Judge Ross there states that the extra-lateral right follows the grant of a properly located claim, whether it is mentioned in the patent or not. That is the substance of it. That position is conceded by Mr. Lindley; and that, if the land is not properly located, no recitation of the extra-lateral right in the patent can operate to make a grant, for the simple reason that the matter is beyond the power of the Land Department to make any such grant.

Now in the same case, N. P. Co. v. Cannon, it is further said:

"The Supreme Court of the State of Nevada, in Rose v. "Mining Company, 17 Nev. 25, held that a patent issued "for a lode or vein claim at a time of a pending contest "between the claimants in the State Court to determine "the right of possession to the identical lode for which "the patent was issued, was absolutely null and void, be- "cause it was issued without authority of law."

That was the entire patent. (Continues reading)

"This decision was affirmed in Mining Co. v. Rose, 114 "U.S.570. In Lakin v. Dolly, 53 Fed. Rep.333, the Circuit "Court for the Northern District of California decided that "a patent issued for a mining lode or vein for more than

"ent issued for a mining lóde or vein for more than "300 feet in width of surface ground, was null and void "as to the excess over 300 feet. Now, in these cases, "as well as those in relation to agricultural lands, the "fact was apparent by the provisions of the law that the "officers of the government had no authority to issue any "patent in the Richmond case, and no patent exceeding "300 feet of surface ground in width in the Lakin case."

This decision was by Judges Gilbert, Ross and Hawley.

I shall have occasion to refer to the case of Lakin v. Dolly again at a later stage of the discussion and on another branch of this case.

In Doolan v. Carr, 125 U. S. 624, the rule is fully stated as follows:

"There is no question as to the principle that where the "officers of the government have issued a patent in due "form of law which on its face is sufficient to convey the "title to the land described in it, such patent is to be "treated as valid in actions at law as distinguished from "suits in equity, *subject, however, at all times to the inquiry "whether such officers have the lawful authority to make a "conveyance of the title.* But if those officers acted with- "out authority, if the land which they purported to con- "vey had never been within their control or had been "withdrawn from that control at the time they under- "took to exercise such authority, then their act was "void—void for want of power in them to act on the sub- "ject-matter of the patent—not merely voidable—in "which latter case if the circumstances justified such a "decree, a direct proceeding with proper averments and "evidence would be required to establish that it was "voidable, and should therefore be avoided. The dis- "tinction is a manifest one, although the circumstances "that enter into it are not always easily defined. It is "nevertheless a clear distinction established by law, and

" it has been often asserted in this Court that *even a patent* " *from the government of the United States issued with all the* " *forms of law may be shown to be void by extrinsic evidence, if* " *it be such evidence as by its nature is capable of showing a* " *want of authority for its issue.*"

Now, that is well illustrated by this Providence map which we had here this morning, and which was taken down a little while ago. The patent undertook to convey 600 feet of the lode south of the segment of ground constituting the Providence Mine proper. The Courts have held—all the Courts, beginning with the Circuit Court and going up to and including the Supreme Court of the United States—that that conveyance of the outside 600 feet, was absolutely void. This of course is simply in line with the Flagstaff case, and all the cases of that class.

This fully illustrates the idea that extrinsic evidence is allowable in such a case to show how and why a patent should be declared void.

In Rose v. Richmond, 17 Nev. 25, 27 Pac. Rep. 1105,—I read from page 1113:

" The necessity of giving Courts of justice final juris-
" diction to review the action of the Land Department
" *even in cases where its officers have jurisdiction to act*, is
" very clearly and forcibly stated by the Supreme Court
" of the United States in Johnson v. Towsley, 13 Wall.
" 72, wherein it was decided that ' the Land Office, *deal-*
" *ing as it does with private rights of great value* in a man-
" ner particularly liable to be imposed upon by fraud,
" false swearing and mistakes, exemplifies the value
" and necessity of this jurisdiction.' But in this case
" the officers of the Land Department had no jurisdiction

"to determine the question at issue. At the time the St. "George patent was issued, there was a valid and pend- "ing contest in the Court to determine the right of pos- "session to the mining ground and lode in controversy, "and the Act of Congress expressly declares that in such "cases 'all proceedings * * * shall be stayed until "'the controversy shall have been settled or decided by "'a Court of competent jurisdiction, or the adverse "'claim waived.' The action of the Land Department "was in violation of this provision of the statute. The "government of the United States under the circum- "stances had no more authority than a mere stranger to "issue the patent. Its officers had no jurisdiction to per- "form any act, and it could not legally issue a patent "while a valid contest was pending in the state courts. "A patent issued without authority of law is void. U. S. "v. Chapman, 5 Sawy. 528; Polk's Lessee v. Wendal, 9 "Cranch 87; Stoddard v. Chambers, 2 How. 285; Mor- "ton v. Nebraska, 21 Wall. 660; Sherman v. Buick, 93 U. "S. 216. In Polk's Lessee v. Wendall, 9 Cranch. 99, the "facts show that the State of North Carolina attempted "to grant lands which she had no title or authority to "grant. The Court declared the patent void. Marshall, "C. J., in delivering the opinion, said: 'There are cases "'in which a grant is absolutely void—as where the "'state has no title to the thing granted, or where the "'officer had no authority to issue the grant. In such "'cases the validity of the grant is necessarily examin- "'able at law.' In Stoddard v. Chambers, 2 How. 318, "the facts showed that a patent had been issued at a "time when the lands therein granted were expressly re- "served from sale. McLean, J., in delivering the opinion "of the Court, said: 'No title can be held valid which "'has been acquired against law; and such is the char- "'acter of the defendant's title so far as it trenches upon "'the plaintiff's. * * * The issuing of a patent is a "'ministerial act which must be performed according to "'law. * * * It is true, a patent possesses the high- "'est verity. It cannot be contradicted or explained by

"'parol, but if it has been fraudulently obtained or issued
"'against law, it is void. It would be a most dangerous
"'principle to hold that a patent should carry the legal
"'title though obtained fraudulently or against law.
"' * * * The patent of the defendant having been
"'for land reserved from such appropriation is void.'
"From the views already expressed it is apparent, that
"the District Court was correct in its conclusions that
"the 'St. George patent was issued without authority of
"'law, while the land embraced in the application was
"'reserved from sale as effectually as though there had
"'been a special Act of Congress excluding it, and that
"'therefore it is absolutely void.'"

So the inquiry in all patent cases comes right down to this: Did the Land Department, under the law as it existed at the time of the issuance of the patent, have the authority to issue such a patent? The very latest mining case passed upon by the Supreme Court of the United States is that of Walrath v. Champion in 171 U. S., decided on May 23, 1898. There it is said:

"The patent in the Flagstaff case appears to have
"been the same as here, and besides, whatever the pat-
"ent here, it must be confined to the rights given by the
"statute which authorizes it."

And this is our rule of interpretation in this case. Whatever the rights are, they must be given by the statute which authorizes the patent.

In Davis v. Wiebbold, 139 U. S. 507, it is said:

"When the patent to the mining company was offered
"in evidence, an objection was taken on the ground that
"the exception contained in it excluded all town lots
"from the grant, and it was necessary for the plaintiff

"to show that the property in controversy did not con-
"sist of lots thus excepted. The exception in the patent
"went only to the exclusion of the lots from interfering
"with the surface of the land granted with the mining
"lode. *But we do not attach any importance to the exception,*
"*for the officers of the land department being merely agents of*
"*the government, have no authority to insert in a patent any*
"*other terms than those of conveyance, with recitals showing*
"*compliance with the conditions which the law prescribes.*
"*Could they insert clauses in patents at their own discretion*
"*they could limit or enlarge their effect without warrant of*
"*law. The patent of a mining claim carries with it such*
"*rights to the land which includes the claim as the law con-*
"*fers and no others, and these rights can neither be enlarged*
"*nor diminished by any reservations of the officers of the land*
"*department, resting for their fitness only upon the judgment*
"*of those officers.*"

Now, if your Honor please, I have presented these cases to show when and under what circumstances a patent may be declared void, because of the language of Judge Field in the Eureka case, quoted by Mr. Lindley yesterday. It has been quoted so often and the language is so sonorous, so high sounding, that it is calculated to deceive the human mind into thinking that there is something in the nature of a fetish, if you please, about a mere patent.

He says that a patent should be held "iron-clad "against all mere speculative inferences." This is true and we are not trying to dispute it here; but, as shown by the decisions and particularly by the case I first adverted to, that is, the Elgin case, wherever it is shown that the Land Department exceeds its jurisdiction and grants or undertakes to grant something it has no power

to grant, that attempt is absolutely void, and cannot be maintained in any Court either of law or of equity.

Location with Diverging End Lines Never Legal.

I said in substance a while ago that, in our opinion, before a location can be held to come under the provisions of section 3 of the act of 1872, it must be shown to be a location made under some law which theretofore existed. It must be a legal location. It becomes us then at this point of the inquiry, to go back and ascertain *whether there ever was a condition of affairs permitting the location of a claim with end lines diverging in the direction of the dip of the lode:* and I assert, without fear of successful contradiction from my very able opponent, that *there never has been a custom or a set of rules permitting it; that there never has been a law permitting it, and there never has been a custom which permitted it to be done.* It is a thing that has no sanction in the rules of miners; it never has had the sanction of any Court, either state or federal. It has not had the sanction of any law and it has not the sanction of any law to-day, and it has never had the sanction of any law or rule since the beginning of mining on the Pacific Coast. It has at all times been impossible that a lawful location could be made with end lines diverging in the direction of the dip of the lode. The statute means lawful locations, not locations made at the caprice or in pursuance of the greed of the locator.

Location with Parallel End Lines Under Miners' Rules. The Comstock.

(Counsel produces Diagram O) This diagram, if your Honor please, is copied from the 4th Sawyer. It is a sheet inserted between pages 402 and 403 in the case of Kinney v. Cons. Va. Mg. Co., which begins on page 382. I have had this plat copied for the purpose of showing clearly the custom of locating mines under the old rules of miners.

Now, these mines, as your Honor will recognize from the names, Mexican, Ophir, Central, California, Central No. 2, White & Murphy, Sides, Best & Belcher, Gould & Curry, are mines located on the Comstock Lode.

We have heard a great deal here in this discussion about the location of claims, and the location of end lines, and the location of claims along the lode, and the location of end lines at right angles to the course of the lode.

When the Comstock mines were located, a base line was agreed upon. This point here (referring to Diagram O) marked as "S. Ophir Stake" is the point from which all the Comstock surveys were measured. It may be called the datum point. This is the proper datum-line (showing Freeman's line on Diagram O) with reference to which all these claims were located, this black line. This red line (showing Mason's line on Diagram O) represents a line claimed as the datum-line by a man named Kinney. He claimed between this datum point (showing) and this point on the base line (showing south end

Diagram O.

W.
Mason's or Complainant's Base and Course of Lode as claimed by Complainant
W. & M. SHAFT
KINNEYS & CENTRAL Nº 2 SHAFT
N. 10° E.
Freeman or Defendant's Base and Course of Comstock Lode as claimed by Defendant
N. 5° W.
S. OPHIR STAKE
210 ft.
933-7
215 ft.
500 ft.
50
100 ft
300 ft.
150 ft
200 ft
100 ft
S.
N.
1200 Level
KINNEY MASON BASE
CON. YA. SHAFT
0 Level
GOULD & CURRY
BEST & BELCHER
SIDES
WHITE & MURPHY
KINNEY, FREEMAN OR DEFENDANT'S BASE
CENTRAL Nº 2
CALIFORNIA
CENTRAL
OPHIR
MEXICAN
Course of end lines of all Claims except Kinneys, at right angles to Freeman's Base.
E.

of the datum-line) twenty feet more than any surveyor or any other claimant could find, and the Court explains the reason for that—this is a discussion by Judge Sawyer. The Court says that the reason Kinney found twenty feet more than any body else could find, was because he adopted as his base line a diagonal line or the hypothenuse of a right angled triangle, which is necessarily longer than its base. If this were the base of the location of these claims (showing), their end lines would all have to be drawn down at right angles to this red line (showing Mason's line) as the datum-line, and this line is necessarily as much as 20 feet longer than the actual datum-line agreed upon by all the other locators.

Now I refer to this claim of Kinney's merely to show clearly how the miners in those days actually did make their locations and how they claimed their ground. They agreed upon a base line, and then one man took 100 feet and another took 200 feet, another took 150 feet, another 300 feet, or a group of claimants took 300 feet, and so on; and in this way the entire lode was divided up and these upright or perpendicular lines show how the vein was taken in its course downward into the earth.

If your Honor please, I would like to know if there is anything in this representation to indicate that in those early days, anything but strict parallelism between the end lines of the different claims located was allowed to prevail? It has been frequently claimed that end lines were formerly not considered by the miners. This is a long decision, and it discusses the subject of end lines

from its beginning to its close, and calls for end lines, and nothing but parallelism is considered from the beginning to the close of this important case. This is how it was done in the old days. There is a great deal of talk afloat, and I am certain that my friend Judge Lindley is responsible for some of it—responsible to a large extent for the idea that prevails in some mining communities that there was a time when men might take their locations any way they pleased. Such a time never existed in the history of mining from the beginning. When the miners entered upon the public lands, this (pointing to Diagram O) is the method by which they defined the bounding planes between their respective rights.

Turning to the history of the Eureka case, and reading the arguments of Judges Heydenfeldt and Mesick, we see what they said as advocates in that high court. It was always parallelism.

I will not take up the time of the Court in reading the language of Judge Sawyer. It is substantially as I have stated it, and the Kinney case is fully illustrative of what I have stated as the universal custom.

Location with Parallel End Lines Under Miners' Rules. The Eureka Case in the Circuit Court.

But it is not necessary for your Honor to rely upon my dictum in these matters. Take the case upon which Mr. Lindley relies for a decision in the case at bar, and let us see if there is any thing in that—in the Eureka case—except strict parallelism. The remarks I am about to

read were made by the Court, as stated by Mr. Lindley yesterday, because of the claim of the Richmond Company that these ore bodies were not lodes, and that they could go outside of these end lines on the strike of the ore bodies wherever they pleased. (Referring to Diagram P).

(Reads from the Eureka case, 4 Sawy. 321): "Now, as

"neither the rules of miners in Eureka Mining district,
"nor the Act of 1866, in terms speak of end lines to loca-
"tions made on ledges, nor in terms impose any limita-
"tion upon miners following these veins wherever they
"may lead, it is contended that no such limitation can
"be considered as having existed and be enforced
"against the defendant. The Act of 1866, it is said,
"recognizes the right of the locator to follow his vein
"outside of any end lines drawn vertically down when it
"permits him to obtain a patent granting his mine 'to
"'gether with the right to follow such vein or lode with its
"'dips, angles and variations to any depth, although it
"'may enter the land adjoining, which land adjoining
"'shall be sold subject to this condition.'
"It is true that end lines are not in terms named in the
"rules of miners." This discussion refers now—and I

am presenting these diagrams for the purpose of showing to your Honor how this matter was from the time of the inception of the mining business before the Act of 1866 was passed.

(Continues reading from Eureka case, 4 Sawy. 322)

"It is true that end lines are not in terms named in the
"rules of the miners, but they are necessarily implied,
"and no reasonable construction can be given to them
"without such implication. What the miners meant by

"allowing a certain number of feet on a ledge was that "each locator might follow his vein for that distance on "the course of the ledge and to any depth within that "distance. So much of the ledge he was permitted to "hold as lay within vertical planes drawn down through "the end lines of his location, and could be measured "any where by the feet on the surface."

Which is exactly as represented on this diagram (referring to Diagram O). Judge Field was entirely familiar with the Comstock lode, and the method of its location and holdings, and the description he gives applies exactly to this condition of affairs. I repeat: "So much "of the ledge he was permitted to hold as lay within ver- "tical planes drawn down through the end lines of his "location, and could be measured any where by the feet "on the surface. If this were not so, he might by the "bend of his vein hold under the surface along the course "of the ledge double and treble the amount he could take "on the surface. Indeed, instead of being limited by the "number of feet prescribed by the rules, he might in "some cases oust all his neighbors and take the whole "ledge. No construction is permissible"—in spite of what Mr. Lindley says here—"*No construction is permissi-* "*ble which would substantially defeat the limitation of quan-* "*tity on a ledge, which was the most important provision in* "*the whole system of rules.*"

How about parallelism here? This is the Eureka case, upon which Mr. Lindley relies! (Continues reading) "Similar rules have been adopted in numerous mining "districts and the construction thus given has been uni- "formly and every where followed. We are confident "that no other construction has ever been adopted in any "mining district in California or Nevada; and the con- "struction is one which the law would require in the ab- "sence of any construction by miners. If, for instance,

"the state were to-day to deed a block in the city of San "Francisco to twenty persons, each to take twenty feet "front in a certain specified succession, each would have "assigned to him by the law a section parallel with that "of his neighbor of twenty feet in width cut through the "block. No other mode of division would carry out the "grant."

If this map (referring to Diagram O) had been made to illustrate the Eureka case, it could not have been made better for the purpose.

So, then, up to the time referred to in this discussion in the Eureka case, nothing but strict parallelism had prevailed any where among the miners of California or Nevada:

"NO CONSTRUCTION IS PERMISSIBLE WHICH "WOULD SUBSTANTIALLY DEFEAT THE LIMITA- "TION OF QUANTITY ON A LEDGE, WHICH WAS "THE MOST IMPORTANT PROVISION IN THE "WHOLE SYSTEM OF RULES."

Is it any wonder that when the statute of 1872 was passed, it said, "the end lines of each claim shall be par- "allel to each other?"

Location with Parallel End Lines Under the Act of 1866. The Statute.

We now come, if your Honor please, in chronological order, down from the time when mines were located under miners' rules as described by Judge Field and as illustrated by Judge Sawyer, to the time of the passage of the Act of 1866. It is always well, it seems to me, to

look closely into the statute. Your Honor will pardon me for quoting the remark of an eminent judge made in my presence to a body of law students, when he said: "Gentlemen, always be sure you know the common law, "but never be sure you know the statute." And I venture to say that ninety-nine hundredths of the confusion upon this subject of end lines in mining matters, have arisen from the fact that lawyers and miners have taken it for granted, without examination, that the law of 1866 did not undertake to confine the miner within parallel end lines.

Your Honor will notice that Judge Field makes no such statement. He merely says that the act of 1866 does not "*in terms*" mention end lines, and that the rules of miners did not mention end lines "*in terms*," but he says that they were necessarily implied by the rules themselves.

Now let us see what the statute says. The first section of the statute of 1866 is almost exactly the same as the first section of the statute of 1872, and it says: "Sec. 1. "That the mineral lands of the public domain, both sur- "veyed and unsurveyed, are hereby declared to be free "and open to exploration and occupation by all citizens "of the United States, and those who have declared their "intention to become citizens, subject to such regula- "tions as may be prescribed by law, and subject also to "the local customs or rules of miners in the several min- "ing districts, so far as the same may not be in conflict "with the laws of the United States."

Sec. 2 refers to the method of obtaining patents. I will not read it at this time, nor will I read section 3 at this time.

Sections 4 and 5 are the two sections I now desire to read to the Court. Section 4 is as follows:

"Sec. 4. That when such location and entry of a mine "shall be upon unsurveyed lands, it shall and may be "lawful, after the extension thereto of the public sur- "veys, to adjust the surveys to the limits of the premises "according to the location and possession and plat "aforesaid; and the Surveyor General may in extending "the surveys vary the same from a rectangular form to "suit the circumstances of the country and the local "rules, laws and customs of miners; *Provided*, that no "location hereafter made shall exceed 200 feet in length "along the vein for each locator, with an additional "claim for discovery to the discoverer of the lode, with "the right to follow such vein to any depth with all its "dips, variations and angles together with a reasonable "quantity of surface for the convenient working of the "same as fixed by local rules: *And provided further*, that "no person may take more than one location on the same "lode, and not more than 3,000 feet shall be taken in any "one claim by any association of persons."

Now, to show your Honor how easy it is to misunderstand the statute, in that excellent work "Lindley on Mines," this very section is quoted on page 675, and on that same page, the author states that no provision is made in the act of 1866 for the taking of any piece of land *as an act of location*, though the language of the section is: "No location hereafter made shall exceed 200 feet "in length along the vein for each locator with an ad- "ditional claim for discovery to the discoverer of the "lode, with the right to follow such vein to any depth "with all its dips, variations and angles, together *with a "reasonable quantity of surface for the convenient working of "the same.*"

I refer to this, not by any means to speak in derogation of Mr. Lindley's book. It has received the commendation of the highest court of the land—parts of it. It is safe to say that no one could handle the immense mass of material handled by Mr. Lindley without making some mistakes, possibly great mistakes, as we think he has made in his construction of the Eureka case and in his philosophic disquisition upon the subject of what rights were secured by locators before the passage of the Act of May 10, 1872, when their end lines diverged in the direction of the dip of the lode.

Now, if your Honor please, the language of this statute of 1866 is exactly in accordance with the miners' rules:

"No location hereafter made shall exceed 200 feet in "length along the vein for each locator * * * with "the right to follow *such* vein any depth."

Can there be any doubt that this means that the locator can only follow his 200 feet? And so it necessarily follows that although the Act of 1866 does not say anything about end lines in terms, it means that a location made under the Act of 1866 must either be with parallel end lines or with converging end lines. It is not within the power of human reason to reach any other conclusion from a reading of the statute, and if it should appear that there is to-day upon the books a decision of any Court to any other effect, and in contravention of this statute, it would be the duty of every Court to construe the statute so as to overrule such decision and to decide according to law—according to the statute—because, as stated by Justice

Brewer in the Del Monte case, the question here "is not, *What is equity? but, What saith the statute?*" And the statute says that no location shall exceed 200 feet.

Location with Parallel End Lines Under the Act of 1866. The Eureka Case in the Circuit Court.

I do not ask your Honor to take my dictum upon this subject. Going back to the Eureka case, I read from page 323 of 4th Sawyer:

"The Act of 1866 in no respect enlarges the right of the "claimant beyond that which the rules of the mining "district gave him." Parallel end lines!—"The patent "which the act allows him to obtain does not authorize "him to go outside of the end lines of his claim, drawn "down vertically through the ledge or lode. It only "authorizes him to follow his vein, with its dips, angles "and variations to any depth although it may enter land "adjoining, that is, land lying beyond the area included "within his surface lines. It is land lying on the side of "the claim, not on the ends of it, which may be entered."

And that means to the fullest extent what is claimed by us, that he cannot bound his claim with swelling or diverging end lines; he must go down between parallel end lines. And that is the doctrine of the Eureka case from the beginning to its close.

(Continues reading from 4 Sawy. 323) "The land on "the ends is reserved for other claimants to explore. It "is true, as stated by the defendant, that the surface land "taken up in connection with a linear location on the "ledge or lode is, under the Act of 1866, intended solely "for the convenient working of the mine and does not "measure the miner's right, either to the linear feet upon

" its course or to follow the dips, angles and variations of " the vein, or control the direction he shall take."

This doctrine is distinctly overruled by the Flagstaff case and all the cases that follow it.

(Continues reading) " But the line of location taken " does measure the extent of the miner's right. That " must be along the general course, or strike, as it is " termed, of the ledge or lode. Lines drawn vertically " down through the ledge or lode at right angles with a " line representing this general course at the ends of the " claimant's line of location will carve out, so to speak, a " section of the ledge or lode within which he is per- " mitted to work and out of which he cannot pass."

Here is the strictest of strict parallelism!

Location with Parallel End Lines Under the Act of 1872. The Eureka Case in the Circuit Court.

(Continues reading from Sawy. 323, 324)

" The Act of 1872 preserves to the miner the rights ac- " quired under the Act of 1866 and confers upon him ad- " ditional rights. Under the Act of 1866 he could only " hold one lode or vein although more than one appeared " within the lines of his surface location. The surface " ground was allowed him for the convenient working of " the lode or vein located and for no other purpose; it " conferred no right to any other lode or vein. But the " Act of 1872 alters the law in this respect. It grants to " him the exclusive right of possession to a quantity of " surface ground not exceeding a specified amount, and " not only to the particular lode or vein located but to " all other veins, lodes and ledges, the top or apex of " which lies within the surface lines of his location, with " the right to follow such veins, lodes or ledges to any " depth. But these additional rights are granted subject

"to the limitation that in following the veins, lodes or "ledges, the miner shall be confined to such portions "thereof as lie between vertical planes drawn downward "through the end lines of his location, and a further "limitation upon his right in cases where two or more "veins intersect or cross each other."

Now, if your Honor please, if there were any possible doubt as to what these two statutes mean, that doubt is solved by the next language:

"THE ACT IN TERMS ANNEXES THESE CONDI-"TIONS TO THE POSSESSION NOT ONLY OF "CLAIMS SUBSEQUENTLY LOCATED, BUT TO THE "POSSESSION OF THOSE PREVIOUSLY LOCATED. "THIS FACT TAKEN IN CONNECTION WITH THE "RESERVATION OF ALL RIGHTS ACQUIRED "UNDER THE ACT OF 1866 INDICATES THAT IN "THE OPINION OF THE LEGISLATURE NO "CHANGE WAS MADE IN THE RIGHTS OF PRE-"VIOUS LOCATORS BY CONFINING THEIR CLAIMS "WITHIN THE END LINES. THE ACT SIMPLY "RECOGNIZED A PRE-EXISTING RULE APPLIED "BY MINERS TO A SINGLE VEIN OR LODE OF THE "LOCATOR, AND MADE IT APPLICABLE TO ALL "VEINS OR LODES FOUND WITHIN THE SUR-"FACE LINES."

(*At this point the further argument of this case was continued until the next day, Wednesday, October 19, 1898, at 10 o'clock A. M., when Mr. Wright resumed his argument as follows*):

For the benefit of Mr. Lindley, I will read to your Honor a paragraph I neglected to read yesterday because, in my opinion then and in my opinion now, it has no particular bearing on this case; but, in order to make certain that I am not overlooking anything, I will read it:

(Reading from 4 Sawy. 323) "As the Act of 1866 re-
"quires the applicant for a patent to file in the local
"office a diagram of his claim, such diagram must neces-
"sarily present something more than the mere linear
"location. It is intended that it should embrace the
"surface claim for the working of the mine. In this way
"each of the patents of the parties embraces one or more
"acres, and the fraction of an acre of surface ground and
"some hundred linear feet on the lode."

As I showed your Honor yesterday, the location of the surface ground is part of the location under the Act of 1866, necessarily so from the language of the section.

The Rule of Parallelism Universal.

Down to the present point in this argument, we have shown, and, as we think, conclusively, that under the miners' rules, parallel end lines were required in all cases. As Judge Field says, "NO OTHER CONSTRUCTION "HAS EVER BEEN ADOPTED IN ANY MINING "DISTRICT IN CALIFORNIA OR NEVADA."

We have shown that under the Act of 1866 a legal location must have been made in such way as to have either parallel end lines or converging end lines, this necessarily following from the language of the statute, which says that no locator can locate more than 200 feet along the lode.

I have found no better language covering this point than that used by Judge Heydenfeldt in his argument in this very Eureka case. He says:

"It is true that, while the Act of 1866 does not spec-
"ifically define that they should be confined within their

"end lines, yet it makes them subordinate in their loca-
"tions to the ordinary rules and regulations of miners,
"and we all understand enough of them to enable the
"Court to take judicial notice of the fact that the laws,
"rules and regulations of miners in the location of ledges
"always were accompanied with the distinct understand-
"ing that parties should be confined within their end
"lines running parallel to the base of their location. If
"that were not so it would be entirely absurd to say that
"a party locating should be confined to so many linear
"feet, because the very instant that you say that a party
"locating so many linear feet can cross his end lines, why,
"as a matter of course, you give him the privilege of tak-
"ing away from every body else's location of linear feet."

Now we have shown from the Eureka case, brought into this discussion by Mr. Lindley himself, that the Act of 1866 in no way extended the miner's right, and we have shown further, and I desire your Honor to listen patiently while I repeat this portion from 4 Sawy. 324:

"The act in terms annexes these conditions to the pos-
"session NOT ONLY OF CLAIMS SUBSEQUENTLY
"LOCATED BUT TO THE POSSESSION OF THOSE
"PREVIOUSLY LOCATED. THIS FACT TAKEN IN
"CONNECTION WITH THE RESERVATION OF ALL
"RIGHTS ACQUIRED UNDER THE ACT OF 1866, IN-
"DICATES THAT IN THE OPINION OF THE LEGIS-
"LATURE NO CHANGE WAS MADE IN THE
"RIGHTS OF PREVIOUS LOCATORS BY CONFIN-
"ING THEIR CLAIMS WITHIN THE END LINES."
This refers to the Act of 1872. "THE ACT SIMPLY
"RECOGNIZED A PRE-EXISTING RULE APPLIED
"BY MINERS TO A SINGLE VEIN OR LODE OF THE
"LOCATOR, AND MADE IT APPLICABLE TO ALL
"VEINS OR LODES FOUND WITHIN THE SURFACE
"LINES."

I might as well at this point read the actual conclusion reached by the Court in this case. Of course your Honor understands that I am reading from the decision rendered by the three judges sitting in bank in the Circuit Court, Judges Field, Sawyer and Hillyer. They say, 4 Sawy. 324:

"Our opinion, therefore, is that both the defendant "and the plaintiff by virtue of their respective patents, "WHETHER ISSUED UPON LOCATIONS UNDER "THE ACT OF 1866, OR UNDER THE ACT OF 1872, "WERE LIMITED TO VEINS OR LODES LYING "WITHIN PLANES DRAWN VERTICALLY DOWN-"WARD THROUGH THE END LINES OF THEIR "RESPECTIVE LOCATIONS; and that each took the "ores found within those planes at any depth in all veins "or lodes, the apex or top of which lay within the surface "lines of its location."

Method of Drawing End Lines. The Eureka Case in Circuit Court.

Now a great deal and perhaps most of the confusion that has arisen in these matters, has arisen from the fact that parties fail to take notice of the distinction between *the end lines of a surface location* and *the actual end line planes* bounding the miner's right. The rule established, or rather the rule undertaken to be established—for I do not hesitate to say to the Court, as I will prove later, that the rule was never established excepting for the short time that this particular decision remained the law of the land—the rule adopted in this case is shown by the language which I shall now read to the Court from 4 Sawy. 319:

"The provision of the statute of 1872, requiring the "lines of each claim to be parallel to each other, is merely "directory, and no consequence is attached to a devia- "tion from its direction. ITS OBJECT IS TO SECURE "PARALLEL END LINES DRAWN VERTICALLY "DOWN AND THAT WAS EFFECTED IN THESE "CASES BY TAKING THE EXTREME POINTS OF "THE RESPECTIVE LOCATIONS ON THE LENGTH "OF THE LODE."

Nothing can be plainer than this, nothing can be plainer than that at this stage of these decisions, the old rule exercised or followed by the miners, was followed by the Court here. The lode was examined and the end lines were drawn through the end points of the location. There is no part of this decision where parallelism is lost sight of. Parallelism is made the cardinal doctrine of the case, and by the language I quoted to your Honor several times yesterday, which says:

"NO CONSTRUCTION IS PERMISSIBLE WHICH "WOULD SUBSTANTIALLY DEFEAT THE LIMITA- "TION OF QUANTITY ON A LEDGE, WHICH WAS "THE MOST IMPORTANT PROVISION IN THE "WHOLE SYSTEM OF RULES."

But as to the method by which these parallel end lines were ascertained, it was as I have described and as laid down here, and the Court held that the provision of the Law of 1872 that the end lines shall be parallel to each other, was merely directory and no consequence attached to a deviation from its direction.

In other words, locations made before May 10, 1872, and locations made afterwards, were put upon the same

plane and subjected to the same rule and that rule a flexible one, the very flexible rule which was the very cause of the adoption of the Act of 1872. This rule was so flexible that under it the end lines of a claim could never be exactly ascertained until a very considerable development of the vein, because the end lines were drawn down at right angles to the course or strike of the vein. This will illustrate it here. (Showing as on Diagram Q.) Here is the general course or strike of the vein as indicated by these underground levels (showing). If the rule were applied here (showing) it would result in the manufacture of two lines exactly as Mr. Lindley has drawn these blue lines on this map. This line (showing) was drawn from the north end point of the Pioneer lode and this line (showing) was drawn from the south end point of the Pioneer lode, at right angles to the general strike or course of the vein as found within the Pioneer Mine. Lest the Court may think I am mistaken, I will read the language again:

"ITS OBJECT IS TO SECURE PARALLEL END "LINES DRAWN VERTICALLY DOWN, AND THAT "WAS EFFECTED IN THESE CASES BY TAKING "THE EXTREME POINTS OF THE RESPECTIVE "LOCATIONS ON THE LENGTH OF THE LODE."

Now this defendant has nothing to fear from such a rule in the case at bar. The strange thing is that the plaintiff should have invoked it. There is nothing in this record, if your Honor please, to show which of these claims was located first. From all that appears in the

record, from all the knowledge that is obtainable, the Kennedy Mine was located first. The Kennedy Mine was patented first and so must be considered prior for all the purposes of this case. The titles would be construed as from the dates of the respective patents and we would have this state of affairs:

Here, if your Honor please (showing as on Diagram J[1]) you can see this green line drawn from the north end point of the lode on the Kennedy Mine to the south end point.

MR. LINDLEY. (Interrupting.) One moment, Mr. Wright. I will ask you to point out any where in the record where the course of the Kennedy vein throughout the Kennedy ground is established, either by—

MR. WRIGHT. By these end points (showing).

MR. LINDLEY. They do not show the course of the vein through the ground.

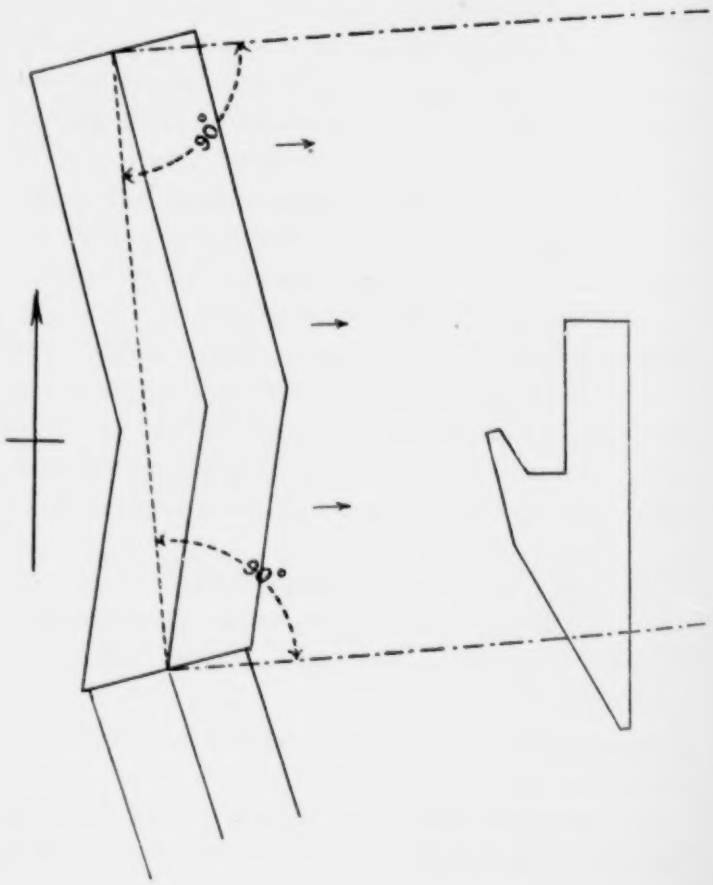
MR. WRIGHT. You stated in your argument that they established the course of the vein for that case (referring to Pioneer claim).

MR. LINDLEY. I interpose an objection here to the statement of counsel, particularly when counsel says that the patent of the Kennedy Company has no place in this action.

MR. WRIGHT. I say so; I am speaking of it to the Court simply for the purpose of illustration.

MR. LINDLEY. Well, then, you may assume it for the purpose of illustration, but I object to your stating as a fact that the course of that vein is as you stated a mo-

Diagram J[1].



ment ago. You may assume whatever you please, of course.

MR. WATERS. The general course.

MR. WRIGHT. I am taking the end points of this location as the rule is stated to be in this case which Mr. Lindley has brought before this Court.

MR. LINDLEY. I said nothing about the north extreme point of the Kennedy lode; I have referred to the south extreme point, but I never went beyond it.

MR. WRIGHT. Now, if your Honor please, I did not drag the Kennedy Mine into this case, and I state further that I am using this merely for the purpose of illustrating this argument, and I say I have a right to bring a hundred mining claims in here and to illustrate from each and every one of them, if the Court will have the patience to listen.

MR. LINDLEY. Oh, I am not objecting to your assuming a course.

MR. WRIGHT. Mr. Lindley need have no fear that I will ask him to subject himself to the absurd rule that he has advanced to this Court, absurd in his contention that it is the law of the land to-day. I say that if this rule were applied in this case, taking these patents as they stand upon the record and applying the rule that Mr. Lindley himself has invoked, this is the state of affairs that we would have: Our south end line would be drawn here (showing as on Diagram J[1]). The record shows that this mine was patented first. Our north end line would be drawn in this manner (showing as on Dia-

gram J[1]) and the ore in dispute would be within the boundaries of the claim so given to the Kennedy Mine. IF THE COUNSEL FOR THE ARGONAUT COMPANY WISHES THE RULE OF THE EUREKA CASE ESTABLISHED FOR THE PURPOSES OF THE CASE AT BAR, I DO NOT THINK HE WILL HAVE ANY DIFFICULTY ABOUT GETTING COUNSEL UPON THE SIDE OF THE DEFENDANT TO STIPULATE THAT THE EUREKA CASE SHALL BE CONSIDERED AS THE RULE, SO FAR AS THE EUREKA CASE GOES IN ESTABLISHING THE LAW OF END LINES. HE HAS INVOKED THE RULE ; LET HIM FOLLOW IT TO ITS ULTIMATE CONSEQUENCES.

I say this is the consequence, and it is impossible in the light of human reason to deny it. I say that this is the rule that was established by the Court in the Eureka case. It is the rule that was contended for by Chief Justice Waite in the Elgin case, as the rule that should prevail, even as late as that case. But it is not the law of the land to-day. THE EUREKA CASE WAS THE CULMINATION AND THE END OF THE OLD REGIME.

We have now reached the point in the history of mining in this country when this old rule was abrogated, and because of the Act of 1872.

The Eureka case is the last of the great cases decided under this rule. Some of the greatest mining judges think it should still be the rule. Judge Beatty, who rendered the Circuit Court decision in the North Star case,

makes no secret of his opinion that it should continue to prevail. Judge Hawley on all occasions favors it in his decisions as far as he can go. But the law of the land is against it, as I shall proceed to show.

Now, if your Honor please, I have reached the end of my discussion of the Eureka case in the Circuit Court so far as the matter is shown by the published decision. I have confined myself strictly to the language of the decision. There is no possible mistake, there is no possible way of escaping the conclusions I have read and presented to your Honor.

The Two Leading Doctrines of the Eureka Case in the Circuit Court.

The doctrine of end lines as I have stated it, is one of the doctrines of this case, and the other doctrine is, that the surface location under the Act of 1866, did not measure any underground right of the miner, but was intended merely for the convenient working of the mine. These are the two doctrines.

In this argument we must follow these two and first find out what becomes of them, and I must recur to the Eureka case itself for the starting point.

Congress Retains Control of Patented Mines.

If your Honor please, I will read from the Act of 1866 a section that was not repealed by the Act of 1872. (reading)

"Sec. 5. And be it further enacted, that, as a further "condition of sale, in the absence of necessary legisla- "tion by Congress, the local legislature of any state or "territory may provide rules for working mines, involv- "ing easements, drainage or other necessary means to "their complete development; and those conditions shall "be fully expressed in the patent."

The full meaning of this paragraph I will not undertake to define at this moment. Your Honor will see fully the bearing of it as the argument progresses.

I repeat: "And be it further enacted, That, as a fur- "ther condition of sale"—

—that is, of patenting lands under the Act of 1866—

"in the absence of any necessary legislation by Con- "gress, the local legislature of any state or territory may "provide rules for working mines, involving easements, "drainage or other necessary means to their complete "development; and those conditions shall be fully "expressed in the patent."

We may say at this time that one thing is surely set forth in this section, and that is that Congress specially reserves the power to control the mines patented under the law of 1866, and, furthermore, this is one of the sections which was not repealed by the Act of 1872, consequently, your Honor, a clause prepared under this section of the statute is inserted in every patent issued.

Now, the popular idea of these patents is, and Judge Lindley has proceeded in his argument on this idea, that just as soon as one of these mining patents is granted, all control over it by Congress ceases. In fact, his argument goes even to the extent that the rights become vested by the Act of location itself. His argument all of the day

before yesterday went to show that the act of location under the Act of 1866 vested the right; but here is a clear reservation of the right of control by Congress.

The Act of 1872 Controls Mines Located Under the Act of 1866. Bill of Exceptions in Eureka Case.

Now, in the discussion of Monday last, a large part of the record in the Eureka case was brought in and was read to the Court. I, too, desire to read from the record of the Eureka case, and to give just emphasis to those parts which I think are properly applicable. And I will read first, the fourth proposition of law advanced by the defendant company, that is to say, by the company that was defeated in the case. (Reads from Bill of Exceptions in the Eureka case)

"4th. The rights and interests of claimants as re-
"ferred to in the last preceding proposition were not im-
"paired or affected in any way by the Act of May 10th,
"1872, above referred to."

Counsel for the defendant in the case asked the Court to rule in that way, and the ruling of the Court is as follows:

"4th. The fourth proposition is sustained, the words
"'*except as specified in the Act of 1872*' being added at the
"end."

Nothing can be plainer than this, if your Honor please. Throughout the Eureka case from the beginning to the end, in its ruling upon these propositions of law as well as in the law as laid down in the published decision, the

Act of 1872 is held as controlling. I am sure your Honor will permit me to read this again for greater precision, but I will read the context first. The third proposition of law advanced by the defendant is as follows:

"3d. Claimants on mining lands under the said act "of July 26th, 1866, who had, prior to the 10th day of "May, 1872, complied with the terms of said first named "act, and to which there was no adverse claim, were en- "titled to enter such land."

Compliance with the said first named act, I may say parenthetically, does not mean locating a claim with diverging end lines. It means locating a claim according to the statute, with no more than two hundred feet for each locator. I repeat:

"who had prior to the 10th day of May, 1872, complied "with the terms of said first named act and to which there "was no adverse claim, were entitled to enter such land, "and receive a patent therefor, granting such mine, to- "gether with the right to follow such lode or vein therein "with its dips, angles and variations although it might "enter the land adjoining, together with a reasonable "quantity of surface for the convenient working of the "same as fixed by local rules."

The Court say: "3d. The third proposition is sus- "tained, the words '*to any depth*' being inserted."

Now, if your Honor please, if this proposition stood alone, it might in some slight degree support the contention of counsel, but it does not stand alone. These propositions of law must be considered together, and the very next proposition is the one that I first read and which is from necessity the controlling one, because it is based

upon the statute and the last statute, which it upholds.

I repeat the fourth proposition:

"4th. The rights and interests of claimants as re-
"ferred to in the last preceding proposition were not im-
"paired or affected in any way by the act of May 10th,
"1872, above referred to."

Here is an attempt to get this high court to decide that the Act of 1872 could not impair any rights whether of location or of patent or under a patent, but the Court was not caught in the trap. They say in answer:

"4th. The fourth proposition is sustained, the words
"'*except as specified in the Act of 1872*' being added at the
"end."

That is to say, the rights of locators under the Act of 1866 were not impaired, EXCEPT AS PROVIDED BY THE ACT OF 1872.

The fifth proposition advanced is as follows:

"5th. Claimants entitled to patents under the Act of
"1866 above referred to, applying for the same after the
"10th day of May, 1872, were entitled to receive a patent
"granting to them their mines located prior to the last
"named date, together with the right to follow their veins
"or lodes with their dips, angles and variations to any
"depth although they might enter the lands adjoining,
"together with a reasonable quantity of surface for the
"convenient working of the same as fixed by local rules,
"and in addition thereto all other veins and ledges
"throughout their entire depths the tops or apexes of
"which lie inside of such surface lines extended down-
"ward vertically, although such veins, lodes or ledges
"might so far depart from a perpendicular course down-
"ward as to extend outside the vertical side lines of the

" surface locations, subject to the provisions of section 3 " of said Act of Congress of May 10, 1872."

The ruling of the Court on this proposition is:

" 5th. The fifth proposition is substantially correct, " and is sustained."

But the Court has just established the proposition that these locations are subject in all their parts and to all intents and for all purposes to the law of May 10, 1872, and it has refused to say that they were not impaired by the law of 1872, so far as that applies.

The seventh proposition is this:

" 7th. That the said patents to the defendants offered " in evidence do not, as to the special and particular lodes " therein named respectively, limit or confine the de- " fendants in their right to follow the vein or lode, with " its dips, angles and variations in their depth to such " portions thereof as lie between vertical planes drawn " downward through the end lines of the location of the " surface ground so continued in their own direction that " such planes will intersect the exterior parts of said " veins or ledges, but that such limit or restraint only " applies to the veins or lodes other than the special lodes " named and granted, which other lodes have their tops " or apexes inside said surface lines extended downward " vertically."

Here is a clear attempt to get the Court to say that special privileges attached to the particular lode located under the Act of 1866 and that the restrictions of the Act of 1872 apply only to the new lodes granted by the Act of 1872, the apices of which are within the lines of the

old location. There seems to have been the same idea then that prevails now to some extent, that some special right attaches to the particular lode, the special lode, located.

Let us see what the Court says:

"7th. The seventh proposition is not sustained by the "Court."

No man has argued more eloquently than the chief counsel for the plaintiff, against permitting the enjoyment of rights in respect of these additional lodes granted under the Act of 1872, greater than the rights that were enjoyed in respect of the lode originally located, and I am glad to say that counsel's view was established long ago, so far as it could be established by this great tribunal.

Now here is another attempt:

"8th. That the defendant under its said patent for "the Richmond Mining ground was and is authorized to "follow the vein or lode therein called the Richmond lode "with its dips, angles and variations although it may "enter the land adjoining, and that the first proviso in "said patent contained does not apply to said Richmond "lode."

This is one of the three propositions which the Court does not answer here, but says that it answers them in the decision, the published decision, from which I have already read.

Now, these are the important propositions that were advanced and ruled upon in the Bill of Exceptions in the Eureka case. They are all controlled by number four.

The ruling on number four is necessarily the basis of them all. And so, whatever the law may be, whether of 1866 or of 1872, and whatever the conditions may be, I say they are controlled by the Act of May 10, 1872, even to the extent of the impairment of rights which were supposed to be established.

MR. LINDLEY. In other words, they impair the right acquired by a certificate of purchase issued by the government?

MR. WRIGHT. I will reach that all in due time, and to your entire satisfaction, I hope.

MR. LINDLEY. Excuse me for interrupting you, Mr. Wright.

MR. WRIGHT. That is all right; I simply wish to give you notice now that I shall discuss that to the fullest extent.

End Line Rule of the Eureka Case in the Circuit Court. Finding 17.

There is only one other part of the record of the Eureka case outside of the published decision, to which I wish to refer. It is that one of the findings which is to the effect that the ore in dispute, which was this Potts Chamber (showing as on Diagram P) lay between the parallel end lines of the Champion, that is, between the parallel surface end lines extended, and also between end lines drawn down through the end points of the At Last and the Margaret respectively.

To Mr. Lindley. Do you remember the number of that finding?

MR. LINDLEY. Finding 17.

MR. WRIGHT. I will read it:

"17th. That the mining ground in dispute is situated "within the lode or ledge as hereinbefore described, and "within planes drawn vertically down through the end "lines of the plaintiff's patented location of the Cham- "pion claim, and within planes drawn vertically down "through the extreme points of the patented locations "of the At Last and the Lupita or Margaret claims at "right angles to the course or strike of the said lode or "ledge and produced so as to follow the dip of the lode. "The top or apex of said lode is within the surface lines "of said patents to the plaintiff, and said lode dips at "right angles to its course and on such dip extends un- "der the surface of the Utah and Arctic claims of de- "fendants."

I read this finding merely for the purpose of accentuating the fact that the Court undertook by its decision to establish as a rule of law, that the requirement for parallelism of end lines under the Act of 1872 was merely directory, and that the proper way to ascertain the end lines was to find the end points, and then to extend planes through those points down across the strike of the lode. There is no other rule of law established in that case as to end lines.

Such is the Eureka case, which was introduced into this Court and into this cause, with what counsel will pardon me for calling a great flourish, as though it were the end of all things.

If your Honor please, I do not think I have lacked candor in discussing this case. If there is any other element in the case, I confess I have failed to observe it.

There is nothing in it which the defendant need fear to meet under the existing condition of the decisions. It is our starting point; and, as I said a while ago, it is the culmination as it is the end of the old conditions.

The Flagstaff Case.

In order to be perfectly frank in this discussion, it is proper for me before taking up the Eureka case in the United States Supreme Court, to discuss the Flagstaff case, which intervenes in point of time.

The Eureka case was decided in the Circuit Court on August 22, 1877; the Flagstaff case was decided in the Supreme Court of the United States on May 5, 1879, a little less than two years thereafter.

I called your Honor's attention a moment ago to the fact that there are two main mining law propositions developed by the Eureka case, the one as to the method of drawing end lines, and the other the proposition twice stated, at least twice, to the effect that the land included within one of the 1866 locations did not in any way define the miner's underground rights:

I repeat from the Eureka case, 4 Sawy. 323:

> " It is true as stated by the defendant, that the surface " land taken up in connection with a linear location on " the ledge or lode is, under the Act of 1866 intended " solely for the convenient working of the mine, and does " not measure the miner's right, either to the linear feet " upon its course, or to follow the dips, angles and varia- " tions of the vein or control the direction he shall take."

This is distinctly laid down as law. Let us see what becomes of it.

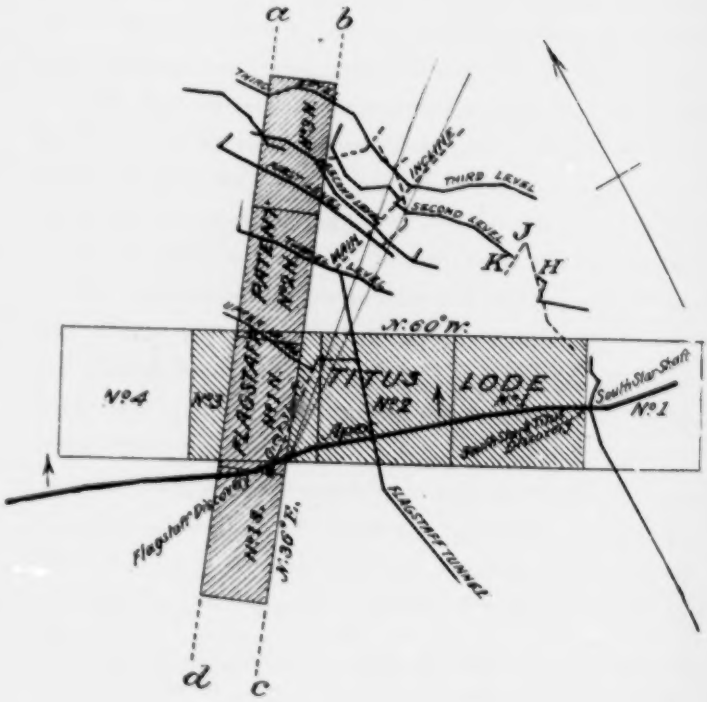
Now the Flagstaff case appears very interesting. I am sorry I haven't a plat. But Judge Lindley has made it unnecessary for me to have one made. If your Honor will kindly glance at this diagram (hands book to Court) the one in reference to the Flagstaff case. (showing Diagram same as Diagram A[1]).

MR. LINDLEY. The one on the left hand page.

MR. WRIGHT. If your Honor please, the language of Judge Field which I have just read, expresses one of the most cherished doctrines of the old miner, namely, that he might take his vein anywhere, regardless of his surface lines. It is illustrated in the extreme in this Flagstaff case, where only 100 feet of the lode were included within the surface lines, though 2600 feet were claimed, the other 2500 feet extending outside, and not being clearly defined by the patent. This is another one of those cases, I may say parenthetically, that show how these mining patents may be attacked by extrinsic evidence showing the underground conditions. The claim here was for 2600 feet, and the owners of the Flagstaff mine claimed that they might take 2600 feet of the vein, wherever it might go. I will not read all of the Flagstaff case to your Honor, as that would be too tedious. I will read the following, Flagstaff v. Tarbet, 98 U. S. 463:

"The Court refused to give the following instructions "propounded by the plaintiffs in error, to wit: 'By the "'Act of Congress of July 26, 1866, 14th stat. at L. 253, "'under which all these locations are claimed to have "'been made, it was the vein or lode of mineral that was "'located and claimed; the lode was the principal thing,

Diagram A[1].


a
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FLAGSTAFF PATENT
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TITUS
No1
LODE
South Star Shaft
No1
Flagstaff Discovery
No1S.
N:36°E:
FLAGSTAFF TUNNEL

"'and the surface area was a mere incident for the con-
"'venient working of the lode; the patent granted the
"'lode, as such, irrespective of the surface area, which an
"'applicant was not bound to claim; it was his con-
"'venience for working the lode that controlled his loca-
"'tion of the surface area, and the patentee under that
"'act takes a fee simple title to the lode, to the full extent
"'located and claimed under said Act.'"

Now it does seem to me, considering the great authority that was behind the Eureka case, that it took a very bold judge to refuse that instruction. It was certainly in harmony with the language that I have read to your Honor from the Eureka case upon this particular topic. That refusal worked momentous consequences. The Supreme Court of the United States proceeds to say:

"Both parties agree in the general rule that the owner
"of a mining right in a lode or vein cannot follow the
"course of the vein beyond the end lines of his location
"extended perpendicularly downwards, but that he may
"follow the dip to an indefinite distance outside of his
"side lines. This is undoubtedly the general rule of
"miners' law, and the true construction of the Act of
"Congress. The language of the Act of 1866, 14 stat. at
"L. 251, in relation to 'a vein or lode' is, 'that no loca-
"'tion hereafter made shall exceed 200 feet in length
"'*along the vein* for each locator, with an additional
"'claim for discovery to the discoverer of the lode, with
"'the right to follow such vein *to any depth*.'"—my emphasis is where the italics are put by the Supreme Court of the United States—"'*to any depth* with *all its*
"'*dips, variations and angles*, together with a reasonable
"'quantity of surface for the convenient working of the
"'same as fixed by the local rules,' etc. The Act of 1872,
"17 stat. at L., 91, is more explicit in its terms:"

In order to show *how* it "is more explicit in its terms," I will read from the two statutes, with your Honor's permission. The first statute, the statute of 1866, says:

"That no location hereafter made shall exceed 200 feet "in length along the vein for each locator, with an addi- "tional claim for discovery to the discoverer of the lode, "with the right to follow such vein," that is, the 200 feet of the vein, necessarily, "to any depth."

The Act of 1872 says:

"A mining claim located after the 10th day of May, "1872, whether located by one or more persons may "equal but shall not exceed 1500 feet in length along the "vein or lode; but no location of a mining claim shall be "made until the discovery of the vein or lode within "the limits of the claim located."

Manifestly this is not the language in which this statute is more explicit than that of 1866, because so far the Act of 1866 is a little bit more particular than the Act of 1872. The Act of 1872 thus far does not say anything about taking the vein to any depth except by inference. It says a mining claim "may equal, but shall "not exceed, 1500 feet in length along the vein or lode." The act of 1866 says: "No location hereafter made shall "exceed 200 feet in length along the vein for each locator "* * * with the right to follow such vein to any "depth."

Certainly it is more explicit thus far than the Act of May 10, 1872. But the same section of the Act of May "10, 1872, closes with the sentence: "*The end lines of* "*each claim shall be parallel to each other.*"

I submit, if your Honor please, that though this had been implied and was necessarily implied by the Act of 1866, the history of the matter is, that the Act of 1866, because it did not furnish a clear definition as to end lines, led to interminable dissensions, just as we have the conditions here in the case at bar. The Kennedy Company would have claimed its end lines at right angles to the general course of the lode within its boundaries, and the Argonaut Company would have claimed its bounding planes at right angles to the general course of the vein within its boundaries, and thus these disputes arose interminably. The dispute here would be over this triangular piece in here (showing with hands as on Diagram E').

These disputes being interminable, the statute of 1872 was passed declaring the meaning of the statute of 1866, when it says:

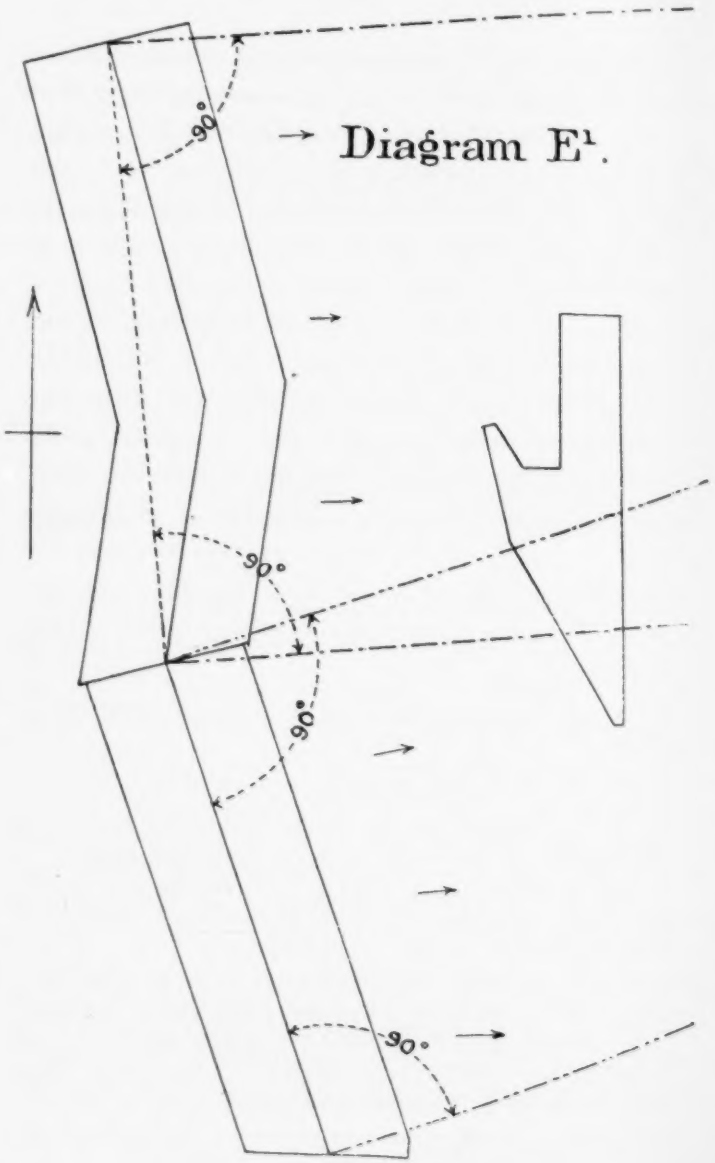
"The end lines of each claim shall be parallel to each other."

And this, as I shall proceed to show your Honor, is held by the later decisions to mean that the end lines *of the surface locations* shall be parallel to each other.

I now proceed with the decision of the Court in the Flagstaff case:

"The Act of 1872, 17 stat. at L. 91, is more explicit in "its terms; BUT THE INTENT IS UNDOUBTEDLY "THE SAME AS IT RESPECTS END LINES AND "SIDE LINES AND THE RIGHT TO FOLLOW THE "DIP OUTSIDE OF THE LATTER."

There is the whole mining law in one sentence.


→ Diagram E¹.
90°
90°
90°
90°

"We think that the intent of both statutes "is that mining locations on lodes or veins shall "be made thereon lengthwise in the general direc- "tion of such veins or lodes on the surface of "the earth where they are discoverable; and that the "end lines are to cross the lode and extend per- "pendicularly downwards and to be continued in "their own direction either way horizontally; and that "the right to follow the dip outside of the side lines is "based on the hypothesis that the direction of these lines "corresponds substantially with the course of the lode or "vein at its apex on or near the surface. It was not the "intent of the law to allow a person to make his location "cross-wise of a vein so that the side lines shall cross it, "and thereby give him the right to follow the strike of "the vein outside of his side lines. That would subvert "the whole system sought to be established by the law. If "he does locate his claim in that way, his rights must be "subordinated to the rights of those who have properly "located on the lode. Their right to follow the dip out- "side of their side lines cannot be interfered with by him. "His right to the lode only extends to so much of the "lode as his claim covers. If he has located cross-wise "of the lode and his claim is only 100 feet wide, that 100 "feet is all he has a right to. This we consider to be the "law as to locations on lodes or veins.

"The location of the plaintiffs in error is thus laid "across the Titus lode, that is to say, across the course of "its apex at or near the surface; and the side lines of the "location are really the end lines of their claim, consid- "ering the direction or course of the lode at the surface.

"As the law stands, we think that the right to follow "the dip of the vein is bounded by the end lines of the "claim, properly so called; which lines are those which "are cross-wise of the general course of the vein on the "surface. The Spanish mining law confined the owner "of a mine to perpendicular lines on every side, but gave "him greater or less width according to the dip of the "vein. See Rockwell, pages 56 and 58, and pages 274

"and 275. But our laws have attempted to establish "A RULE BY WHICH EACH CLAIM SHALL BE SO "MANY FEET OF THE VEIN LENGTHWISE OF "ITS COURSE TO ANY DEPTH BELOW THE SUR-"FACE, ALTHOUGH LATERALLY ITS INCLINA-"TION SHALL CARRY IT EVER SO FAR FROM A "PERPENDICULAR. This rule the Court below strove "to carry out, and all its rulings seem to have been in "accordance with it."

Always and everywhere throughout these decisions, your Honor will find the doctrine of parallelism.

Less than two years after the Eureka case was decided, we find one of its main propositions overruled by the Supreme Court of the United States. The Eureka case says that the ground located in connection with the lode does not bound the extent of the miner's right. Within less than two years thereafter, the Flagstaff case says that it does bound the extent of the miner's right. And the Flagstaff case has been followed by all the later decisions where it says that "OUR LAWS HAVE ATTEMPTED "TO ESTABLISH A RULE BY WHICH EACH "CLAIM SHALL BE SO MANY FEET OF THE VEIN "LENGTHWISE OF ITS COURSE TO ANY DEPTH "BELOW THE SURFACE."

The doctrine of parallelism is certainly set forth clearly in the Flagstaff case by this very language, and the decision in this case was quoted with approval almost entire by the Supreme Court of the United States in its latest great mining decision, Mr. Lindley's Providence case. So the doctrines of the Flagstaff case are the law of mining to-day. They are the last expression of the Supreme

Court of the United States on the subject, namely, the land located does bound the extent of the miner's right, and parallelism is its basic rule.

The Eureka Case in the Supreme Court.

It was after the Flagstaff decision was announced, however, that the Supreme Court of the United States took up and decided the Eureka case. Now what is the law announced by that Court in the Eureka case as to end lines? In Richmond v. Eureka, 103 U. S. 839, after discussing the compromise line upon which so much stress has been laid, the Court says:

"This disposes of the case. The Richmond Company "is in no condition to dispute the validity of the Eureka's "patents for the At Last and the Margaret because the "end lines of the surveys are not parallel; as it has "agreed with the Eureka for a consideration not to work "in the limestone to the south and east of the compro- "mise line. Upon the face of the patents"—

—and, if your Honor please, the Margaret and the At Last were both patented under the law of 1872. There is nothing in the patents about the law of 1866. And, if it is any comfort to Mr. Lindley, I will state that, so far as the patents show, the locations were made and perfected and patented under the law of 1872. The Court goes on to say:

"Upon the face of the patents the United States has "granted the Eureka the right to all veins, lodes, and "deposits the tops or apexes of which lie on the inside of "its surveys as patented, throughout their entire depth

"and wherever they may go, provided it keeps itself "within the end lines of the surveys. The finding that "the ground in dispute is within the end lines and that "the apex is within the surface lines, settles the rights "of the parties between themselves as well under their "patents as under their compromise agreement."

Here, as in the Court below, the Court does not undertake to differentiate between locations made under the Act of 1866 and locations made under the Act of 1872. It simply says, in effect, that "the end lines of the sur-"veys" are the controlling feature. In the Court below the judges were careful to mark the end lines through the end points of the locations, to draw parallel bounding planes through the end points of the locations, *regardless of the end lines of the surveys.* But part of the language used here by the Supreme Court would seem to convey the meaning that the end lines of the surface locations are held to control—that the bounding planes are to be ascertained by extending the end lines of the surface locations. It is clear upon an examination of this decision that the only portion of the decision of the Court below as to end lines which was directly and certainly sustained, is that part which says:

"The provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction."

Upon that proposition the decision by the Supreme Court followed the Court below, but there is something else. So far as the results of this discussion are con-

cerned, probably it makes no difference whether the Supreme Court meant that the end lines of the surface locations decided the location of the bounding planes, or whether it meant that the bounding planes were to be drawn down through the end points and at right angles to the general course of the lode. It is no particular matter, because of the subsequent decisions of that Court. But it is interesting to know, and it may be important, that the same justice who wrote the opinion of the Supreme Court in the Eureka case, also wrote the dissenting opinion in the Elgin case; and we may therefore very properly look to the Elgin case and to his dissenting opinion there expressed, to determine what was the real meaning of the language used in the Eureka case. I think that is fair reasoning.

I read the dissenting opinion of Chief Justice Waite in the Elgin case, 118 U. S. 209:

"I cannot agree to this judgment. In my opinion the "end lines of a mining location are to be projected paral- "lel to each other and cross-wise of the general course of "the vein, within the surface limits of the location, and "whenever the top or apex of the vein is found within the "surface lines extended vertically downwards, the vein "may be followed outside of the vertical side lines. The "end lines are not necessarily those which are marked "on the map as such, but they may be projected at the "extreme points where the apex leaves the location as "marked on the surface."

This is without change the doctrine of the Eureka case in the Circuit Court, and it is a fair inference, considering that is is by the same Justice, Mr. Chief Justice Waite,

who wrote the prevailing opinion of the Supreme Court in the Eureka case, that it is what was intended by the language used by the Supreme Court in the Eureka case on the same subject.

To my own mind there is no doubt about it, but there is, as I said before, a portion of the language which might be taken to mean that the end lines of the survey, that is, of the surface location, were what should be held as controlling.

The Elgin case was decided April 26, 1886, about five years after the decision of the Supreme Court in the Eureka case, and it is certainly not a violent presumption that Mr. Justice Waite entertained the same opinion during the short period of five years.

At any rate, the Supreme Court in the Eureka case upheld the doctrine that the statute of 1872, when it says "the end lines of each claim shall be parallel to each "other, is merely directory, and no consequence is at- "tached to a deviation from its direction."

The Elgin Case.

We come now directly to the discussion of the body of the Elgin case. I don't know of any other or better presentation of this case than the diagram found in Mr. Lindley's book, and as he has kindly allowed me to use my "post-mortem argument," I will refer to his book. (Showing diagram similar to Diagram J.)

MR. LINDLEY. After the adjournment, I will bring you, if you wish it, large maps of the Argentine and the Elgin cases.

Diagram J.

Surv. No. 490
GILT EDGE
(Disputed Ground)
STONE
Outcrop
Center Line of
Apex and
Surv. No. 217
North End Line
Direction of Dip
Direction of Strike
South End Line
Strike of Lode
1
2
3
4
5
6
7
8
9
10
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14

MR. WRIGHT. Our view is, if your Honor please, that the mining law, as evidenced by the decisions, has steadily progressed from the time of the decision in the Eureka case. The first great step was taken by the decision in the Flagstaff case. The next step was taken by the decision in the Elgin case, the case of Iron Silver Mining Co. v. Elgin Mining & Smelting Company, 118 U. S. 196.

As I stated yesterday, the question in this case was brought up by the introduction of evidence by the owners of the Stone claim, showing or tending to show that the vein found within the Stone claim extended on its dip underneath the surface of the Gilt Edge claim, to a point where the owners of the Gilt Edge claim were taking out the ores in dispute. The patent to the Stone claim nominally granted the extra-lateral right, and the testimony was objected to by the owners of the Gilt Edge claim upon the ground that that portion of the Stone patent was void, in the same manner as we have raised our objections here; and the decision of the Court upheld that proposition, that there was no extra-lateral right although it was nominally granted, and that therefore the owners of the Stone claim could not pursue their vein out from under their surface and into and under the surface of the Gilt Edge claim.

After quoting Section 3 of the Act of 1872, which is the same as Sec. 2322 of the Revised Statutes, the Court says:

"This section appears sufficiently clear on its face. "There is no patent or latent ambiguity in it. The lo- "cators have the exclusive right of possession and en- "joyment of 'all the surface included within the lines

"'of their locations' and the location, by another sec-
"tion, must be distinctly marked on the ground, so that
"its boundaries can be readily traced. . R. S. 2324.
"They have also the exclusive right of possession and
"enjoyment 'of all veins, lodes and ledges throughout
"'their entire depth, the top or apex of which lies inside
"'of such surface lines extended downward vertically,
"'although such veins, lodes or ledges may so far depart
"'from a perpendicular in their course downward as to
"'extend outside the vertical side lines of said surface
"'locations.' The surface side lines extended downward
"vertically determine the extent of the claim, except
"when in its descent the vein passes outside of them and
"the outside portions are to lie between vertical planes
"drawn downward through the end lines. This means
"the end lines of the surface location, for all locations
"are measured on the surface."

This claim was located, as heretofore stated, under the Act of 1872.

But, if your Honor please, this is the same judge who wrote the opinion of the Circuit Court in the Eureka case, saying there that the law of 1872 requiring parallelism of the end lines of surface locations was merely directory and no consequence could attach to a deviation from its direction, and he here in the Elgin case says:

"THE SURFACE SIDE LINES EXTENDED DOWN-
"WARD VERTICALLY DETERMINE THE EXTENT
"OF THE CLAIM, EXCEPT WHEN IN ITS DESCENT
"THE VEIN PASSES OUTSIDE OF THEM, AND THE
"OUTSIDE PORTIONS ARE TO LIE BETWEEN
"VERTICAL PLANES DRAWN DOWNWARD
"THROUGH THE END LINES. THIS MEANS
"THE END LINES OF THE SURFACE LOCATION,
"FOR ALL LOCATIONS ARE MEASURED ON THE
"SURFACE."

The Elgin Overrules the Eureka Decision

And this is by the same judge who a few years before laid down the doctrine that the two statutes were exactly the same in their meaning in this respect, namely, that under each statute you took the end points of the location and passed your bounding planes through them vertically, that is, at right angles to the general course of the lode. That same judge now says that it is the end lines of the surface location that bound the extra-lateral right and here we have the second inroad made upon the doctrines of the Eureka case. In the house of its own friends it is overthrown and by the very judge who wrote the decision.

MR. LINDLEY. Is it not Judge Field who wrote in the same decision that under that state of facts—that under the act of 1866 the end lines of locations were not required to be parallel?

MR. WRIGHT. I will come to that presently, Judge, if you will exercise a little patience, and I will answer you fully and I hope to your satisfaction.

The Court goes on to say as follows:

"The difficulty arising from the section grows out of "its application to claims where the course of the vein is "so variant from a straight line that the end lines of the "surface location are not parallel, or, if so, are not at "right angles to the course of the vein. This difficulty "must often occur where the lines of the surface location "are made to control the direction of the vertical planes. "The remedy must be found, until the statute is changed, "in carefully making the location, and in postponing the "marking of its boundaries until explorations can be

"made to ascertain, as near as possible, the course and "direction of the vein. In Colorado the statute allows "for this purpose sixty days after notice of the discovery "of the lode. Then the location must be distinctly "marked on the ground, and thirty days thereafter are "given for the preparation of the proper certificate of "location to be recorded. Erhardt v. Boaro, 113 U. S. "527, 533. Even then, with all the care possible, the end "lines marked on the surface will often vary greatly from "a right angle to the true course of the vein. But what-"ever inconvenience or hardship may thus happen, it is "better that the boundary planes should be definitely de-"termined by the lines of the surface location, than that "they should be subject to perpetual readjustment "according to subterranean developments made by mine "workings. Such readjustment at every discovery of a "change in the course of the vein would create great un-"certainty in titles to mining claims. The rule, whatever "hardship it may work in particular cases, should be set-"tled, and thus prevent, as far as practicable, such uncer-"tainty.

"If the first locator will not or cannot make the explo-"rations necessary to ascertain the true course of the "vein, and draws his end lines ignorantly, he must bear "the consequences. He can only assert a lateral right to "so much of his vein as lies between vertical planes "drawn through those lines. Junior locators will not be "prejudiced thereby, though subsequent explorations "may show that he erred in his location."

The Court further says, later on:

"This view of the controlling effect of the end lines "of the surface location is also sustained by the decision "of this Court in the Flagstaff case, Mining Company vs. "Tarbet, 98 U. S. 463. There the court said that, 'the "'most practicable rule is to regard the course of the "'vein as that which is indicated by surface outcrop or "'surface explorations and workings.' And that 'it is

"'on this line that claims will naturally be laid what-
"'ever be the character of the surface, whether level or
"'inclined,' and that the end lines of the claim, properly
"so called, 'are those which are cross-wise of the general
"'course of the vein on the surface.' The Court sug-
"gested that the law might be imperfect in this respect,
"and that perhaps the true course of the vein should
"correspond with its strike or the line of a level run
"through it, but it added that this 'can rarely be ascer-
"'tained until considerable work has been done and
"'after claims and locations have become fixed.'"

And so the Eureka case crumbles and crumbles.

MR. MCGEE. Will you permit me to ask you a question? The Elgin case, as I understand it, was a decision on a location made under the act of 1872.

MR. WRIGHT. Yes.

MR. MCGEE. The act of 1872 provided that the end lines of locations must be parallel, and the Elgin case decided that in locations made under that act extra-lateral rights attached?

MR. WRIGHT. Yes.

MR. MCGEE. Now, did the Elgin case say anything about the necessity of parallel end lines under the act of 1866?

MR. WRIGHT. I have promised to answer Judge Lindley fully on that matter.

(At this point a recess was taken until 2 o'clock in the afternoon of the same day, when Mr. Wright resumed his argument as follows):

Now, if your Honor please, this diagram which Judge Lindley has kindly lent me, pretty well illustrates the Elgin case. (Showing diagram similar to Diagram J.)

Your Honor will note that the lode passes into the claim through this line (showing) which is marked as the "North End Line," then follows this tortuous course around the rim of the gulch, and out of this side line (showing line from 6 to 7). This line from 5 to 6 (showing) was marked on the survey for the patent, as an end line, and probably, as the Court remarked, for no other reason than that it was in point of fact parallel to the line from 1 to 14. But, inasmuch as the lode does not pass through it, the Court held that it does not perform any of the functions of an end line, and that therefore it is not an end line, the two end lines, properly so called, being the line from 1 to 14 and the line from 6 to 7, marked upon this diagram as they are marked, I think, on the plat in the Supreme Court report. The ore in dispute was off in this direction (showing) under this Gilt Edge claim. But I have already discussed this case quite fully, so it is not necessary to make any very full remarks upon it, except to read the conclusions of the Court.

Parallel Surface End Lines Necessary.

(Reads) "We are, therefore, of opinion that the objection that by reason of the surface form of the Stone claim the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof. Besides, if the lines marked as end lines on the plat of that claim

" can be regarded as such lines of the location "—that is to say, if this line from 1 to 14 and the line from 5 to 6 can be regarded as end lines of the location—" no part " of the Gilt Edge claim falls within vertical planes " drawn down through those lines continued in their own " direction. In either view of the location of the Stone " claim, the rejected proof would have established no de- " fense. The premises in controversy are admitted to be " under the surface lines of the Gilt Edge claim eastward " from the defendant's claim and the plaintiffs were " therefore entitled to recover them."

There are two other propositions in this decision which I desire to quote to your Honor, as they are inseparably connected with this chain of argument as it develops. (Reads)

The Surface End Lines Control and the Same End Lines Bound all Lodes.

" The provision of the statute, that the locator is en- " titled throughout their entire depth to all the veins, " lodes or ledges, the top or apex of which lies inside of " the surface lines of his location, tends strongly to show " that THE END LINES MARKED ON THE GROUND " MUST CONTROL. It often happens that the top or " apex of more than one vein lies within such surface " lines, and the veins may have different courses and " dips, yet his right to follow them outside of the side " lines of the location must be bounded by planes drawn " vertically through the same end lines. The planes of " the end lines cannot be drawn at a right angle to the " courses of all the veins, if they are not identical."

This second principle in the Elgin case, is a re-affirmance of the doctrine laid down by one of the rulings in

the Eureka case. It is not necessary for me to repeat it. Your Honor will recall that the Richmond Company claimed special privileges as to the old lode, in other words, as to the particularly located lode, more privileges with regard to that than as to the other lodes included within the surface lines of the location, the titles to which were conferred by the Act of 1872 as to all the claims.

The decision on that particular point in the Eureka case is not found in the decision as reported in the books but only in the bill of exceptions of which Judge Lindley furnished us copies. That part of the decision in the Eureka case held, like the Elgin decision, that the same end lines controlled all lodes. That is one of the principles that has been maintained from the Eureka case until the present time, and it was affirmed again in the Providence case, of which Judge Lindley's map is here.

The north end line of the Providence and the south end line of the Providence (showing as on Diagram S) are held to be the end lines of the claim with reference to all the lodes the apexes of which are found within the surface boundaries of the claim extended vertically down. So that proposition is finally established, as it was affirmed in the Eureka case, repeated in the Elgin case and finally again in the Providence case. Walrath v. Champion, 171 U. S.——.

The Two Statutes the Same as to Parallelism.

There is another feature of this case concerning which the gentlemen on the other side desire to be enlightened,

and I shall take pleasure in throwing what light I can upon the subject. Your Honor will bear in mind that it is Judge Field who writes this opinion, and he says:

(Reads from the Elgin case)

"Under the act of 1866 parallelism in the end lines of "a surface location was not required; but where a loca- "tion has been made since the act of 1872, such parallel- "ism is essential to the existence of any right in the lo- "cator or patentee to follow his vein outside of the verti- "cal planes drawn through the side lines. His lateral "right by the statute is confined to such portion of the "vein as lies between such planes drawn through the end "lines and extended in their own direction; that is, be- "tween parallel vertical planes. It can embrace no "other portion."

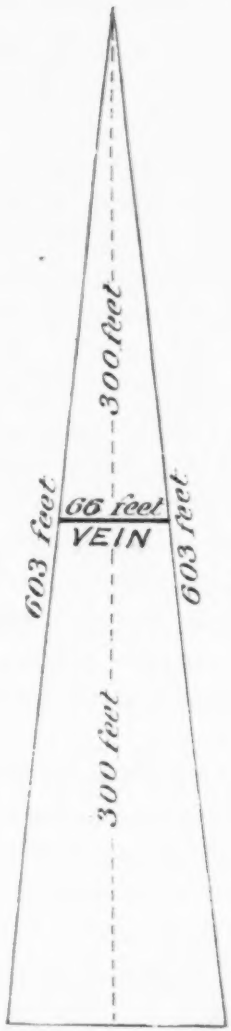
Now the latter portion of this paragraph speaks for itself so plainly that no one can misunderstand it. It must be borne in mind that this was a case arising upon a location made under the act of 1872, the patent following it. I should say that this was what was under discussion. It was clearly laid down as a rule of law and is the law of this case for all purposes, that as to such locations the end lines must be made parallel. I showed your Honor this morning, and I think with reasonable clearness, that every principle of the Eureka case except one has been already swept away. And this reservation, or this language which appears as a reservation, is necessarily *obiter dictum*. I say necessarily because it was not necessary to say this; it was not necessary to a decision of this case.

It has, however, been commented upon by many courts. Those particularly in favor of the old rule which we discussed this morning, seem to think that this is intended as a necessary reservation of that rule, and it has been referred to in a number of decisions in that way. It has been referred to as though the Supreme Court of the United States had meant by this particular language that in cases of locations made prior to May 10, 1872, it is not necessary that the *end lines* shall be parallel in order that the extra-lateral right shall be granted, and as though it stated affirmatively that they would be granted whether the *end lines* were parallel or not. I state that this is the first impression that one receives from an examination of this language. As I said a moment ago, your Honor will find a number of cases, some of them having been already cited by Judge Lindley, where this language has been referred to. I am sure the Judge will pardon me for referring once more to my "post-mortem" pamphlet. On page 31 your Honor will find a few remarks made by myself on a former occasion with reference to this matter, and it contains the result of my investigation of the subject at that time.

In that little argument I said: (Reading from Argument of John M. Wright for defendant in C. C. of U. S., 9th Circuit, N. D. of Calif., on Motions to Remand Causes of Argonaut Mg. Co. v. Kennedy M. & M. Co. to State Court, Nov. 29 and Dec. 6, 1897)

"'Under the Act of 1866, parallelism in the end lines "'of a surface location was not required'—'parallelism "'in the end lines of a surface location,' it says.

Diagram L.



"If your Honor please, the Court might just as well say "the same thing of the law of 1872, at even this stage of "the decisions. Suppose we insert 1872 in the place of "1866 and make the language read:

"'Under the act of 1872, parallelism in the end lines "'of a surface location is not required.'

"That is absolutely true under all the decisions. The "land will be granted. A surface location will be grant- "ed under either Act, whether the end lines are parallel "or not. In the case of Montana Company v. Clark, 42 "Fed. 626, the land was in the shape of an isosceles tri- "angle and yet no one questioned the validity of the title "to the land."

If your Honor will turn to Diagram 4 on the next page, page 32, you will find an illustration of the isosceles triangle case which I have just referred to (showing diagram same as Diagram L). That is as near as I could make a correct diagram from the language of the decision.

In that case the Court very properly held that there was no extra-lateral right because the end lines were not parallel and the location was made under the Act of 1872. *But no one thought of questioning, as I quoted a moment ago, the right of the owner to the surface and to everything therein contained.*

My comment at that time went a little further and I said: (reading from page 31 of the pamphlet)

"Does an extra-lateral right attach, is always the im- "portant question, whatever may be the shape of the sur- "face claim.

"This language, if your Honor please, is very cau- "tiously used. It is, I think, tantamount to saying:

"'We refuse at this stage to decide whether there is "'any difference between a claim under the law of 1866 "'and a claim located under the law of 1872.'

"The fact actually stated by the Court is equally true "in both cases."

It is not necessary for me to repeat the language of the decision again.

Now, lest your Honor should think that I have thus put a strained construction upon this language for the purposes of the case at bar, I will call your Honor's attention to the very last sentence of the very last paragraph of the very last mining decision given forth by the Supreme Court of the United States. Your Honor will find it on page 935 of the pamphlet handed you yesterday, (No. 16 for Oct. Term, 1897, Advance Sheets, L. C. P. Edition of U. S. Supreme Court reports) containing the Providence case, where this very language of the Supreme Court in the Elgin case is commented upon. The Supreme Court is speaking by Mr. Justice McKenna. (reading)

"IT MAY BE THAT THERE WAS LIBERTY OF "SURFACE FORM UNDER THAT ACT, BUT THE "LAW STRICTLY CONFINED THE RIGHT ON THE "VEIN BELOW THE SURFACE. THERE IS LIB- "ERTY OF SURFACE FORM UNDER THE ACT OF "1872. IT WAS EXERCISED IN IRON SILVER MIN- "ING CO. V. ELGIN MINING & S. CO. *SUPRA*, IN "THE FORM OF A HORSE-SHOE; IN MONTANA CO. "LIMITED V. CLARK, 42 FED. REP. 626, IN THE "FORM OF AN ISOSCELES TRIANGLE."

This is the latest utterance of the Supreme Court of the United States upon this subject. It was placed in this decision, as I conceive the matter, for the express pur-

pose of explaining away that first sentence quoted from the Elgin case.

I should not say "explaining away;" I do not mean that, but to explain the real meaning of it, and to show that, as to both classes of locations, the Supreme Court of the United States has determined to put them upon the same level and to go back, if you please, to first principles, and to hold every man to parallel end lines according to the rules of the miners.

But when and where was any other rule ever followed? Where is the decision showing that any one was ever allowed to go outside his surface between divergent end lines in the manner claimed here for the Pioneer? Whence arose the desire to do so? It arose because certain old locators found that they had made mistakes in their locations. Hence arose this stress of determination to make a new rule, something unheard of among the rules of miners, so that men might extend their possessions underneath the surface of the earth until, in the language of Judge Field, they would "oust all of their "neighbors and take the whole ledge." It is the doctrine of greed. It has no foundation in the law.

Development of the Mining Law.

The next case which I shall present for the consideration of your Honor, is the case of Lakin v. Dolly, which opens up a different branch of this discussion. I am taking up the whole matter in historical sequence, so as to show the development of the mining law from year to

year, and the next important case is the case of Lakin v. Dolly, 53 Fed. 333. But before taking up this case, it will be necessary to go into some few preliminaries, and I wish to read Section 9 of the Act of 1872, which is as follows:

Reservations of the Act of 1872.

"Sec. 9. That sections 1, 2, 3, 4, and 6 of an act entitled "'An Act granting the right of way to ditch and canal "'owners over the public lands and for other purposes,' "approved July 26th, 1866, are hereby repealed, but such "repeal shall not affect existing rights. Applications for "patents for mining claims now pending may be pros- "ecuted to a final decision in the General Land Office; "but in such cases where adverse rights are not affected "thereby, patents may issue in pursuance of the provi- "sions of this act; and all patents for mining claims "heretofore issued under the act of July 26th, 1866, shall "convey all the rights and privileges conferred by this "act, where no adverse rights exist at the time of the "passage of this Act."

And the last clause of section 16 of the act of 1872, which reads as follows:

"*Provided*, that nothing contained in this act shall be "construed to impair, in any way, rights or interests in "mining property acquired under existing laws."

Now it is claimed by many that it is intended by these provisions to preserve *all* rights intact, whether of location or under patent, as they existed at the time the law of 1872 was passed. It is my intention to read from a few cases for the purpose of showing how this matter is construed by the Courts, as to what rights are main-

tained and what are not, as to what rights are considered vested rights and what are not. I read from the case of Gwillim v. Donellan, 115 U. S. 45, where the language is:

"A valid and subsisting location of mineral lands made "and kept up in accordance with the provisions of the "statutes of the United States, has the effect of a grant "by the United States of the right of present and exclu- "sive possession of the lands located."

This language is very strong, if your Honor please, and it would seem that a location thus made so as to have the "effect of a grant," would establish one of those vested rights which are to be protected under the Act of 1872. We will make our inquiries for the purpose of ascertaining whether this is true or not.

The Patents Now Before the Court.

And it is time, your Honor, to pay some little attention to the contents of these patents now before the Court. I may say that they are precisely the same in form except in one respect. Your Honor is familiar with the fact that patents which were issued under the law of 1866, invariably expressed or defined or described the lode that was granted, by metes and bounds. This was required by the statute itself, which stated in terms that no more than one lode could be granted, "which shall be expressed in "the patent issued."

Now, in the case of the Kennedy patent to the Kennedy Mine, the lode is defined as this lode line is laid down here, a line laid down by the field notes just exactly as it is here (showing as on Diagram Q).

In the case of the Pioneer patent, the lode is not specifically described except by reference to its south end point and its north end point. I think the description of the Kennedy lode begins at this point (showing bend in Kennedy vein) and goes on to this point (showing south end center) then comes back to this point (showing bend in vein) and goes to this point (showing north end center). Except in that respect, as I said before, these patents are the same in form. The patent of the Pioneer mine begins as follows:

The Pioneer Patent.

"Whereas, in pursuance of the Act of Congress ap-
"proved July 26th, 1866, entitled 'An Act granting the
"'right of way to ditch and canal owners over the public
"'lands, and for other purposes,' the Act amendatory
"thereof approved July 9th, 1870, and the act approved
"May 10th, 1872, entitled 'An Act to promote the devel-
"'opment of the mining resources of the United States,'
"there have been deposited in the General Land Office of
"the United States the plat and field notes of survey of
"the claim of the Pioneer Gold and Silver Mining Com-
"pany upon the Pioneer Quartz lode bearing gold, accom-
"panied by the certificate of the Register of the Land
"Office at Sacramento, in the State of California, whereby
"it appears that in pursuance of said acts of Congress,
"the Pioneer Gold & Silver Mining Company did, on the
"23rd day of February, A. D. 1872, enter and pay for said
"mining claim or premises, being Mineral Entry No. 63,
"in the series of said office, designated by the Surveyor
"General as Lot No. Forty eight (48) embracing a portion
"of the north-east quarter of section Twenty (20) in
"Township Six North of Range eleven East Mount
"Diablo Mer. in the Jackson Mining District, in the

"County of Amador, and State of California, in the Dis-
"trict of lands subject to sale at Sacramento embracing
"twenty two and twenty two hundredths (22.22) acres of
"land, more or less, and according to the returns on file
"in the General Land Office, bounded, described and plat-
"ted as follows, with magnetic variation at seventeen
"(17) degrees east, to wit:" Then follows the description.

The Four Classes of Patents.

This description of the procedure under which this patent was obtained, brings to mind at once that there are in existence four classes of mining patents. The first class includes those that were actually patented before the passage of the law of May 10, 1872, that is to say, those cases where the patent was actually issued. The second class is the class within which these two patents fall, namely, those where the application was made and a large portion of the proceedings had been carried on—in these cases the proceedings had gone so far that the land had been entered and paid for before the passage of the Act of May 10, 1872. The third class is of those cases where the location was made but no application was made in the Land Office nor any other step taken towards the getting of a patent before the Act of May 10, 1872, was passed. And the fourth class is of those cases where the location itself was made after the passage of the Act of May 10, 1872.

The Applicant Had His Option to Patent Under Either Act.

I have read to your Honor the statute on the subject of procuring patents but there are one or two paragraphs

I think I ought to repeat: (Reading from Sec. 9, Act of May 10, 1872)

" Applications for patents for mining claims now pend-
" ing may be prosecuted to a final decision in the General
" Land Office; but in such cases where adverse rights are
" not affected thereby, patents may issue in pursuance of
" the provisions of this Act."

Now it becomes us to inquire what was done in this particular case before the Court.

Your Honor will notice *that this statute does not provide that a patent may issue under the provisions of both acts. The patent may issue under the provisions of this act or the application may be pursued to its conclusion under the Act of 1866.* That is the express provision of the statute, and if this patent shows by internal evidence that it was issued under the Act of May 10, 1872, we say that then the lands granted by this patent are subject to all the restrictions—that the owner of this patent is entitled to all the privileges and subject as well from necessity to all the restrictions—of the act of May 10, 1872.

Your Honor will here note that we are not dealing with a patent issued under the Act of 1866. These proceedings were pending when the Act of 1872 was passed, and the applicant had his option expressly granted him by the section I have read, to proceed to patent under the Act of 1866, if, in his judgment, he would acquire greater rights thereby; or, if no adverse claims existed, he might proceed to patent under the provisions of this Act of May 10, 1872.

Review of the Pioneer Patent, Continued.

The next paragraph of the patent describes the segment of land granted; the next defines the mill site, this Pioneer mill site (showing as on Diagram Q) and then follows the grant, or attempted grant, of the lode, which I have already read to your Honor. I think I had better read this:

"Now Know Ye, that the United States of America in "consideration of the premises and in conformity with "the said Acts of Congress, have given and granted, and "by these presents do give and grant, unto the said "Pioneer Gold and Silver Mining Company and to their "successors and assigns the said mining premises here-"inbefore described as Lot Number forty-eight (48) em-"bracing a portion of the north-east quarter of Section "twenty (20) in Township Six (6) North of Range eleven "(11) East, Mount Diablo Meridian, with the exclusive "right of possession and enjoyment of all the land in-"cluded within the exterior lines of said survey, not "herein expressly excepted from these presents, and of "1589 94-100 linear feet of the said Pioneer quartz vein, "lode, ledge or deposit, as hereinbefore described "throughout its entire depth, although it may enter the "land adjoining,"—

MR. LINDLEY. (Interrupting.) Does not the patent itself say that it was issued under the Act of 1866, as well as under the Act of 1872?

MR. WRIGHT. Yes, sir; I have already read that portion of the patent.

One Statute or the Other Must Control.

MR. LINDLEY. Excuse me, I did not hear it.

MR. WRIGHT. I read it as distinctly as I could and it

will be found in the minutes. But what I say is that the statute allows a man to go to patent under the Act of 1866 where his application was pending when the statute of 1872 was passed. But he had his option to patent under the Law of 1872. He did not have the option to take all the rights and privileges under the Act of 1866, whatever they might be, subject to none of the restrictions of the Act of 1872, and to take all the rights and privileges under the Act of 1872, subject to none of the restrictions of the Act of 1866, which is what the gentlemen asks in this Court to-day. There is no such thing in the law.

The Pioneer Patent Issued Under the Act of 1872.

The internal evidence of the patent itself will show what was granted, the evidence shown by the patent itself is what we must go by. But I will continue reading from the patent: (reading)

" and of all the veins, lodes, ledges or deposits through-
" out their entire depth, the tops or apexes of which lie
" inside the exterior boundary lines of said survey at the
" surface extended downward vertically, although such
" veins, lodes, ledges or deposits in their downward
" course may so far depart from a perpendicular as to
" extend outside the vertical side lines of said survey."

Here, if your Honor please, is one of the distinguishing characteristics of patents issued under the law of May 10, 1872. It is a distinct grant by the patent itself of these lodes other than the principal lode located.

(Continues reading from the patent)

" Provided, that the right of possession hereby granted
" to such outside parts of said veins, lodes, ledges or de-

"posits, shall be confined to such portions thereof as lie "between vertical planes drawn downward through the "end lines of said survey at the surface so continued in "their own direction that such vertical planes will inter- "sect such exterior parts of said veins, lodes, ledges or "deposits."

Here we have another of the distinguishing features of a grant under the Act of May 10, 1872. These rights must be exercised between the end lines of the survey at the surface, but the ownership of these additional lodes is one of the privileges that is granted under the Act of 1872. Is it possible that gentlemen can come into a Court of justice and say that they are entitled to all the privileges under an act and are not to be subjected to any one of its restrictions? The proposition is absurd upon the face of it. I read further:

"And provided, further, that nothing in this convey- "ance shall authorize the grantees herein, their succes- "sors or assigns, to enter upon the surface of a mining "claim owned or possessed by another:

"To have and to hold said mining premises, together "with all the rights, privileges, immunities and ap- "purtenances of whatsoever nature thereunto belong- "ing, unto the said Pioneer Gold and Silver Mining Com- "pany and to their successors and assigns forever, sub- "ject, nevertheless, to the following conditions and stipu- "lations:

"First—That the grant hereby made is restricted to "the land hereinbefore described as Lot No. forty eight "(48) with 1589 $^{94}/_{100}$ linear feet of the Pioneer Quartz "vein, lode, ledge or deposit throughout its entire depth "as aforesaid, together with all other veins, lodes, ledges "or deposits throughout their entire depth as aforesaid "the tops or apexes of which lie inside of the exterior

"lines of said survey, and to which no valid adverse "claim existed on the 10th day of May, 1872."

Here is an attempt by the officers of the Land Office to grant a segment of the lode or rather segments of several lodes, without defining the segments. But they have restricted this grant in terms to 1589 $^{94}/_{100}$ linear feet. I admit that it was made under the supposition that a rule such as the rule laid down by Judge Field in the Eureka case would prevail, namely, that the provisions of the Act of May 10, 1872, as to parallelism of end lines was merely directory, and that no consequence would attach to a deviation from its direction, and that the end lines would be drawn down from the end points.

But the patent itself demands parallelism throughout. Throughout this discussion, through all the cases, it is parallelism, parallelism from beginning to end. Does plaintiff mean to say that it has the option to go north or to go south or to go in the middle and pick its land? Why, this Act of May 10, 1872, was passed for the very purpose of allowing every man to define his right so that thereafter there could be no question as to what he owned, and so that all these altercations as to whose claim was located first, and about end lines, should be done away with. Yet here we are asked at this late day for something that is not granted by any statute under any ruling. I read further:

"Second—That the premises hereby conveyed with the "exception of the surface, may be entered by the propri- "etor of any other vein, lode, ledge or deposit, the top "or apex of which lies outside of the exterior limits of

"said survey should the same in its downward course be "found to penetrate, intersect, extend into, or underlie "the premises hereby granted, for the purpose of extract- "ing and removing the ore from such other vein, lode, "ledge or deposit.

"Third—That the premises hereby conveyed shall be "held subject to any vested and accrued water rights for "mining, agricultural, manufacturing or other purposes, "and rights to ditches and reservoirs used in connection "with such water rights as may be recognized and "acknowledged by the local laws, customs and decisions "of courts."

Then follows a recitation in substance of the condition contained in section 5 of the Act of 1866, which has never been repealed:

"Fourth—That in the absence of necessary legislation "by Congress, the legislature of California may provide "rules for working the mining claim or premises hereby "granted, involving easements, drainage, and other "necessary means to its complete development."

Now, as I said to your Honor, the internal evidence here is clear and it is beyond peradventure that the Land Department of the United States undertook to issue this patent under the Act of 1872. So far as the recitation in the patent to the effect that it is issued under the Act of 1866 is concerned, it may go to the extent that some of these proceedings took place under the Act of 1866. It is a mere recitation of that fact but the effect of it all is that a part of the proceedings took place under the Act of 1866, but that the patent is granted under the Act of 1872 as provided by section 9 of the Act of 1872. That is the effect of it, and there is no escape from it by any rule of reason.

I shall not ask your Honor to accept my dictum on this point. I shall present decisions of the highest courts, which will nail down and clinch this proposition beyond peradventure.

The Lakin Cases.

I now proceed to discuss the case of Lakin v. Dolly. And if this discussion should be lengthened beyond the court's anticipation, I hope your Honor will bear with me. It is necessary in the development of these problems, to follow the history of the mining decisions from the passage of the Act of May 10, 1872, to the present time, and I am simply following the development of the mining law as established and shown by the decisions of the Courts.

As suggested by my associate, the Eureka case was a case of first impression. To-day there is nothing left of it, except the one provision that the same end lines bound all lodes. Everything else has been swept away, as I have shown to your Honor, and to the shreds and tatters and crumbling remains of it, the plaintiff is welcome!

I will not read the statement of facts in this case of Lakin v. Dolly, but the facts shown upon the record were: that the claim was located under the Act of 1866 or, at any rate, prior to May 10, 1872; that the surface land located on one side of the lode was about 50 feet in width and that a very large extent of territory was located on the other side of the lode; and that the whole location passed to patent. I think the first steps in the way of making an application for patent had been taken before

May 10, 1872. The patent itself was issued upon the location as made, with much more than 300 feet of ground on one side of the lode. Here is a diagram in Mr. Lindley's book to which I call your Honor's attention. (showing diagram same as Diagram K).

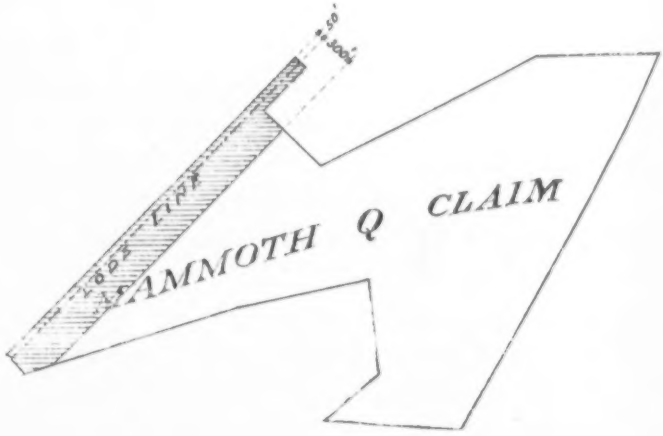
Now, if your Honor please, here was a location which, *as a location*, was perfected prior to the passage of the Act of May 10, 1872. The Land Department passed it to patent and it was therefore to be conclusively presumed that the amount of surface land that was attached to this lode was a proper amount under the rules of miners within the district where the mine was situated.

MR. LINDLEY. Permit me to correct you there, please. The decision in this case was reviewed by Judge Hawley in the North Star case, where it is especially stated that the local rules in evidence before the Court at that time limited the surface to a hundred feet and that the patent was issued in violation of the local rules. I do not want you to make such a statement without my calling your attention to the fact that you are falling into a grievous error.

MR. WRIGHT. Much obliged to you for your fairness, but we will take pains to rectify our error, if we are in error, as we are familiar with the statement of the Judge in the case you refer to.

Now, I say that under all the decisions, it is to be conclusively presumed from this patent that that area was a proper area under the rules of the miners, and Judge Lindley cannot find a case in the books to the contrary.

Diagram K.



That is one of the questions which the Land Department could rule upon; it is one of the questions which was within its jurisdiction. But let us see how the case develops. There is no need to be in haste about this.

I read from 53 Fed. 337:

"It is claimed by plaintiff that upon the facts of this "case, and under the provision of section 2328 Rev. St. "U. S., the patent must be considered and treated as hav- "ing been issued under the Act of Congress of 1866. IT "IS IMMATERIAL, SO FAR AS THE RESULT OF "THIS DECISION IS CONCERNED, WHETHER THE "PATENT IS CONSTRUED WITH REFERENCE TO "THE ACT OF 1866, OR THE SUBSEQUENT PRO- "VISIONS OF THE REVISED STATUTES, UNDER "AND IN PURSUANCE OF WHICH THE PATENT "PURPORTS TO HAVE BEEN ISSUED; BUT I AM "OF OPINION THAT THE QUESTION AS TO THE "VALIDITY OF THE PATENT DEPENDS UPON "THE CONSTRUCTION TO BE GIVEN TO SECTION "2320, REV. ST. U. S."

Now, Judge Hawley does not say here that this was because the rules of miners only allowed a hundred feet. He says this decision is based on section 2320 of the Revised Statutes of the United States. I read further:

"This section reads as follows:

"'Mining claims upon veins or lodes of quartz or other "'rock in place bearing gold, silver, cinnabar, lead, tin, "'copper or other valuable deposits, heretofore located, "'shall be governed as to length along the vein or lode "'by the customs, regulations, and laws in force at the "'date of their location. A mining claim located after "'the 10th day of May, 1872, whether located by one or "'more persons, may equal, but shall not exceed 1500 "'feet in length along the vein or lode; but no location

" ' of a mining claim shall be made until the discovery of
" ' the vein or lode within the limits of the claim located.
" ' No claim shall extend more than 300 feet on each side
" ' of the middle of the vein at the surface, nor shall any
" ' claim be limited by any mining regulations to less
" ' than 25 feet on each side of the middle of the vein at
" ' the surface, except where adverse rights existing on
" ' the 10th day of May, 1872, render such limitation
" ' necessary. The end lines of each claim shall be paral-
" ' lel to each other.' "

The Court then goes on to say:

" This entire section seems to be clear, definite, and
" certain. It provides that all mining claims upon
" quartz lodes located prior to its passage, should be
" governed as to the length of the claim along the lode,
" ' by the customs, regulations and laws in force at the
" ' date of their location; ' that the claims located after
" May 10, 1872, ' may equal, but shall not exceed, 1500
" ' feet in length along the vein or lode.' So far the sec-
" tion relates solely to the question of the length of the
" lode that may be located. It next takes up the ques-
" tion as to how much surface ground will be allowed to
" the locator of a quartz lode, and says that, ' no claim '—
" evidently meaning all claims, whether coming within
" the first clause relating to claims located prior to the
" passage of this section, or within the second clause, re-
" lating to locations made subsequent thereto—' shall
" ' extend more than 300 feet on each side of the middle
" ' of the vein at the surface.' Having thus expressed
" the extent of the surface ground to which the locator
" may be entitled, it further provides that the amount of
" the surface ground shall not in any case be limited by
" any mining regulations to less than 25 feet on each side
" of the middle of the vein at the surface, except in cer-
" tain contingencies, which have no application to the
" facts of this case. AFTER THE PASSAGE OF THE
" ACT OF WHICH THIS SECTION FORMS A PART,

"IT SEEMS VERY CLEAR, TO MY MIND, THAT THE "LAND DEPARTMENT HAD NO JURISDICTION, "POWER OR AUTHORITY TO ISSUE A PATENT "FOR A QUARTZ LODE TO ANY SURFACE "GROUND EXCEEDING 300 FEET IN WIDTH ON "EACH SIDE OF THE MIDDLE OF THE VEIN OR "LODE, AND THAT ANY PATENT WHICH IS IS-"SUED FOR MORE THAN THAT AMOUNT OF SUR-"FACE GROUND IS ABSOLUTELY NULL AND "VOID AS TO THE EXCESS OVER 300 FEET, AND "CAN BE COLLATERALLY ATTACKED IN A "COURT OF LAW."

If your Honor please, it seems to me that Judge Hawley by this language has saved us a great deal of trouble. He has divided this section, in his discussion, into two parts, the first portion of the paragraph referring to the length of claims, and the second portion referring to the width of claims and containing the important provision that "the end lines of each claim shall be parallel to "each other."

Now, if your Honor please, there are some things that need no explanation, and this is certainly one of them. If the language as to the WIDTH of the claims is universal, how can it by any process of reasoning be contended that the language as to END LINES is not also universal? It is within the same portion of the same paragraph. "This entire section," the Court says, "seems to be clear, "definite and certain."

The Court says, when it takes up the second paragraph: "'No claim'—evidently meaning all claims, "whether coming within the first clause relating to "claims located prior to the passage of this section, or

" within the second clause, relating to locations made " subsequent thereto—' shall extend ',' etc.

This is universal language, the Court says, in effect.

Now, when this paragraph says that no claim shall extend more than three hundred feet and another part of it, the concluding part of it, says, " the end lines of each " claim shall be parallel to each other," I would like to know upon what principle of logic or of reasoning or of common sense, it can be held that that last line does not apply to all claims; certainly, if your Honor please, to all unpatented claims, whether located before or after the passage of the Act of May 10, 1872. I say this is beyond peradventure.

Now if it were true that the owners of locations made prior to May 10, 1872, were protected in all their rights by the Act of May 10, 1872—if that were the meaning of the statute—would a Flagstaff decision be possible, if your Honor please? Certainly not! Now, in the Flagstaff case, those portions of the lode that were located outside of the segment of ground that was located, were considered as much a part of the location as the part within the segment, yet the Supreme Court swept all those portions of the claim away by the Flagstaff case.

And here in Lakin v. Dolly, we come to another development, where extraordinary surface rights were claimed, and the Court held in effect that no matter what your claim may have been when the Act of 1872 was passed, that statute itself cut off your land so that you can have no more than 300 feet on either side of your lode.

Gentlemen may reason, and they may struggle, but these cases are beyond peradventure. The next page in the development of this case was in the 54th Federal.

Gwillim v. Donellan and Belk v. Meagher.

When the language in Gwillim v. Donellan was used to the effect that a location is tantamount to a grant, it would appear as though the Court meant that all the rights acquired by means of an act of location were vested rights. But certainly these decisions show that such is not the case. These decisions show that no right becomes vested until the patent is finally passed, and not then when issued against law.

THE COURT. This case of Gwillim v. Donellan is cited to the same effect as Belk v. Meagher, 104 U. S. 279?

MR. WRIGHT. Yes, that is the same general idea.

THE COURT. Of course the point involved in the case of Belk v. Meagher, if I remember the case rightly, was that while the location was still valid, no other locator could get upon it.

MR. WRIGHT. Yes, that is the point of the decision; that decision was rendered in 1881.

Lakin v. Roberts.

Now, this case of Lakin v. Dolly came up in the United States Circuit Court of Appeals under the name of Lakin v. Roberts, 54 Fed. 461, before McKenna and Gilbert, Circuit Judges, and Deady, District Judge. Judge McKenna wrote the opinion, and he says:

"Plaintiff's counsel contends that the provision for "the width of claims applies only to subsequent loca- "tions, and that section 2328 of the Revised Statutes re- "serves to plaintiff the provisions of the Act of July 26, "1866. Section 2328 of the Revised Statutes is as fol- lows:

"'Applications for patents for mining claims under "'former laws now pending may be prosecuted to a final "'decision in the General Land Office, but in such cases "'where adverse rights are not affected thereby, patents "'may issue in pursuance of the provision of this "'chapter, and all patents for mining claims upon veins "'or lodes heretofore issued, shall convey all the rights "'and privileges conferred by this chapter where no "'adverse rights existed on the 10th day of May, 1872.'

"It is not contended that plaintiff's interests were so "far vested that by that act Congress had no power to "limit or vary them. We shall assume, therefore,"—

—now, right here is suggested, if your Honor please, the true rule that underlies this whole subject, as I shall show your Honor fully at a later period of this discussion, THAT CONGRESS DID HAVE A RIGHT TO CON- TROL THIS WHOLE MATTER—

"We shall assume, therefore, that CONGRESS HAD "THIS POWER, AND, HAVING IT, WE THINK IT "EXERCISED IT IN THE PROVISIONS WE HAVE "QUOTED. The language of the section of the Revised "Statutes must be confined to preserving the applica- "tion, and of all rights EXCEPT THE SIZE OF THE "CLAIM, LENGTH AND WIDTH OF IT.

"All the provisions of the statutes would not other- "wise be given effect. The Land Department, therefore, "had no power to issue a patent for a greater width of "land than 300 feet, and the patent in this case in excess "of 300 feet is void. Doolan v. Carr, 125 U. S. 624, 8 Sup. "Ct. Rep. 1228, and the other decisions cited in the

"opinion of the learned judge who tried the case in the "Circuit Court."

The Lakin Cases in the U. S. Supreme Court.

This decision becomes of paramount importance in the light of its subsequent history. I am sure your Honor will be pleased to read the petition for re-hearing before the Circuit Court of Appeals, as well as the petition presented on behalf of the losing party for a writ of *certiorari* and a writ of error in the Supreme Court of the United States. If I thought counsel could possibly object to this, I should not offer it to the Court.

MR. LINDLEY. We have not the slightest objection.

MR. WRIGHT. I may say to the Court and counsel that, in my opinion, the briefs that were presented in this case are exhaustive as to what constitutes and what do not constitute vested rights within the meaning of the statute of 1872. They are upon the side that is represented by Mr. Lindley in the case at bar, otherwise I would not feel that I had a right to present them. I think I have here all of the briefs. They were prepared by Mr. H. L. Gear, whom we all know as a lawyer who leaves nothing undone that can be done in preparing his cases.

MR. LINDLEY. That was a petition for a writ of *certiorari* and it was denied by the Supreme Court of the United States.

MR. WRIGHT. Yes, and something else was done, I am glad to be able to state for your satisfaction.

If your Honor please, there are three methods of reach-

ing the Supreme Court of the United States; one is by the writ of *certiorari*, which questions the jurisdiction, one is by writ of error and the third is by the ordinary appeal. In this case, as it appears, an application was made for a writ of *certiorari*, and that was denied, and an application was made for a writ of error, and that was denied, and the records of the Supreme Court of the United States show that fact. That case has therefore become the law of the land. The Supreme Court of the United States frequently refuses a writ of *certiorari* where the jurisdiction was properly entertained below, because, as your Honor well knows, the writ of *certiorari* is used, when the matter is properly presented, for the sole purpose of bringing up the question of jurisdiction. But where the right of appeal exists, where the right to a writ of error exists, who ever heard of the Supreme Court of the United States refusing a writ of error, excepting under circumstances where they know that if the writ were brought in they would be compelled immediately to dismiss the writ—because they approve of the law of the case as laid down by the court below?

(See R. S. of U. S., Sec. 999, and Sec. 6 of Chap. 517, Act of Mar. 3, 1891, establishing U. S. Courts of Appeals).

[Mem. The first of these citations was not mentioned at the oral argument and the second was not mentioned in this place.]

I say that this is to-day, according to its history, as the matter now stands upon the records of the Courts, the supreme law of this land. There can be no question

about it, and I am glad to say that it was made the law of the land after the most exhaustive presentation of the case by the other side, so as to leave no doubt as to what was intended.

That being the case, whatever Judge Hawley said or did not say in the North Star case, could not affect the authority of this case as the law of the land. This case was decided under the section of the Revised Statutes referred to, and it will stand until reversed either directly or by clear implication.

My associate asks if I have read to the Court the actual decision in the court of appeals. The decision was this:

"The Land Department therefore had no power to "issue a patent for a greater width of land than three "hundred feet, and the patent in this case in excess of "three hundred feet is void."

MR. MCGEE. The patent was for 250 acres of land wasn't it, in that case?

MR. WRIGHT. I don't know; I know it passed the Land Office, which has jurisdiction in these cases.

MR. LINDLEY. The patent was for 252 acres.

MR. WRIGHT. The patent was in opposition to section 2320 of the Revised Statutes, therefore it was declared void. I don't know whether it was for 5,000 or 250 acres; the principle is the same. It is section 2320 that we are contending for.

This is one of those monumental decisions that stand and throw light upon these new questions.

Review of the Lakin Cases in the North Star Case.

Now, if your Honor please, in so far as the North Star case is concerned, the Court simply held, in effect, that the Lakin cases did not affect the question of extra-lateral rights in that case, the North Star case.

I read from Carson City v. North Star, 83 Fed. 668:

"It appears from the patent and is shown in the dia-
"gram that the mining ground patented varies in width
"from 650 to 1250 feet, and it is therefore claimed by
"plaintiff in error that the patent is void upon its face,
"and Lakin v. Dolly, 53 Fed. 333, and Lakin v. Roberts,
"4 C. C. A. 438, 54 Fed. 462, are cited and relied upon in
"support of this contention. Every case must be consid-
"ered with reference to its own peculiar facts. The
"Lakin cases did not involve any construction of the law
"appertaining to the extra-lateral rights of the lode pat-
"ented to the Mammoth Gold Mining Company. The
"lode neither in its length or depth was involved. It was
"only the surface ground that was in dispute. The pat-
"ent in those cases embraced two separate mining loca-
"tions and conveyed 4100 feet of a gold bearing quartz
"lode with 252 $^{95}/_{100}$ acres of land. The lode as located
"and fixed on the surface of the ground was in a straight
"line along the northwest boundary of the patented tract
"and was within fifty feet of said line. The surface tract
"covered by the patent, except said fifty feet was on the
"south-east side of said lode and extended about three-
"quarters of a mile therefrom. Under the rules and reg-
"ulations of the Mining District where said lode was
"situated, the locator was entitled to only 100 feet of
"ground on each side of the lode, and under the laws of
"the United States (Rev. St. Sec. 2320) the amount of sur-
"face is restricted to 300 feet. The question there was
"whether by virtue of the surface ground the owner of
"the mining claim could include real estate within the
"surface boundaries situated more than 300 feet distant

"from the lode. Upon the facts the court held that under "the provision of section 2320 Rev. St. U. S., the Land "Department had no jurisdiction, power or authority to "issue a patent to a quartz lode for any surface ground "exceeding 300 feet in width on each side of the middle "of the vein or lode, and that any patent that is issued "for more than that amount of surface ground is abso- "lutely null and void as to the excess over three hundred "feet, and that the patent might be collaterally attacked "in a court of law. *It will thus be seen that there "were no principles of law involved in those cases which "have any application whatever to the case at bar.* In this "case the plaintiff in error does not claim any right "whatever to the surface boundaries of the North Star "claim as patented, and it is a well settled and elemen- "tary principle of law that the possession of this surface "ground by the defendant in error is sufficient evidence "of title as against any one not showing any higher or "better right thereto. Moreover, even if the principles "of the Lakin cases could be considered remotely or "otherwise as having any application to the present case, "still the defendant in error would be entitled to the vein "or lode which was proved and established in this case, "and to the surface ground for three hundred feet on "each side of the center of the lode, and this is all that is "required to give the party the extra rights which are "provided for by the statute."

Now, as your Honor is entirely aware, in the North Star case the end lines converged in the direction of the dip of the lode—

MR. MCGEE. (Interrupting) Why don't you read the next paragraph, Mr. Wright?

MR. WRIGHT. I have read all that refers to this Lakin-Dolly decision.

MR. MCGEE. I don't think that is fair to the Court.

MR. WRIGHT. What is not fair to the Court? Why, Mr. McGee, what are you talking about? I have a right to bring into this discussion only that part of the decision that refers to the question under consideration. (To the Court) But in order to satisfy Mr. McGee, I will read the next paragraph, which by the wildest stretch of the imagination could not be held to have any reference whatever to this particular question. But, before reading it, I wish to comment upon the language that I have just read. I wish to repeat that whether or not in point of fact the local rules in this case permitted a man to have only one hundred feet, we say that that fact was concluded when the matter passed the Land Office, and it was concluded in such a way that the Court was necessarily compelled to decide this question under section 2320 of the Revised Statutes, and the Court said in terms that it construed it under that section. The Circuit Court and the Circuit Court of Appeals both said the same thing, and no one would be quicker to contend that the matter was concluded by the action of the Land Department than the gentlemen upon the other side.

Even though the local rules provided that not more than twenty-five feet could be allowed, if it once passed the Land Department on that question of fact, it was concluded. It has been held over and over again that these local rules are among the questions that can be decided by the Land Office and that its decision upon such questions of fact cannot be collaterally attacked for any purpose whatever. So much for the North Star case.

The North Star End Line Decision.

Now Mr. McGee wants me to read something that is entirely foreign to the subject under discussion before the Court.

MR. MCGEE. It is a part of the decision.

MR. WRIGHT. It is a part of the decision, that is true, but it has nothing whatever to do with the question under discussion. However, I will read it.

"The plaintiff in error contends that, if the patented "area of the North Star is to be considered as a location, "its end lines are not parallel as found by the Court, and "that under section 2320 Rev. St., the defendant in error "possesses no extra-lateral rights under it. The act of "1866 under the provisions of which the patent in this "case was applied for and under which the rights of de- "fendant in error accrued, did not require parallelism of "end lines. Walrath v. Mining Company, 63 Fed. 552- "556."

I think Judge Hawley has given birth to several decisions of the same nature, which are exactly in line with this. In the Wyoming case the end lines converged in the direction of the dip of the lode, and it was conceded by counsel that those converging end lines bounded the extra-lateral right.

The Wyoming—Ural End Line Decision.

As to the Ural, the same thing was conceded, and on the end line map that I had the pleasure of presenting to the Court, I made no claim of anything outside of the converging end lines; but Judge Hawley, following the

Diagram B[1].

WYOMING
WYOMING PATENT CODE LINE
Apex of Wyoming or Vein
Apex of Ural or Contact Vein
URAL
URAL PATENT CODE LINE
S. END LINE OF URAL AS FIXED BY COURT.

rule of the Eureka case, gave parallel end lines down to the center of the earth. As to the Ural claim, I think I am correct in saying—he gave parallel end lines cut through the south end line of the Ural claim—

(See Diagram B[1], which was not used at the oral argument.)

MR. LINDLEY. (Interrupting) Judge Hawley constructed an end line at a point where the vein passed out of the side lines, parallel to a line that the lode did not cross, and an appeal was taken to the United States Circuit Court of Appeals from the decision and the whole case was compromised before it ever reached the appellate court. In other words, the Champion Company bought out the Wyoming.

The North Star Decision, Continued.

MR. WRIGHT. That is right. (Reading from the North Star case)

"Under this act, 'however tortuous might be the course "'of the lode, the claimant had a perfect right to follow "'it up and prepare his diagram so as to include it, to-"'gether with the surface ground on each side thereof "'allowed by local laws. There is no language in the "'act that requires the diagram to be in the form of a "'parallelogram or in any other particular form.' Wol-"fley v. Mining Co., 4 Colo. 112-116. Moreover, the end "lines marked on the diagram converge in the direction "of the dip, giving the patentees less of the vein or lode "in depth than they had at the surface. The object of "the act of 1872 in requiring parallelism of end lines was "intended to give to the claimant of the lode as much of "the lode or vein in its downward course as he has at the

" surface but no more. It appears from the findings that
" the defendant in error was only allowed 2,200 feet of
" the apex of the lode because it was cut off on the west
" by a ' crossing ' as shown on the diagram. The restric-
" tion of its rights in these particulars cannot be com-
" plained of by the plaintiff in error."

Now, if Mr. McGee has another case of the sort I shall take the greatest pleasure in reading it, because my throat is not sore at all. But this work would naturally devolve upon him.

I have already adverted to this class of cases and I say to theCourt that in every single instance—there is not one single exception—where this rule has been adopted, even in the cases where the end lines converge,—in every single case where this rule has been adopted or suggested, the adoption of the rule or its suggestion has been based upon the remark in the Elgin case which I have already explained by the language which the Supreme Court has picked out for the express purpose, in my opinion, of showing that the next time it gets a chance at a claim that was patented under the law of 1866, it intends to hold, no matter what the shape of the claim is, that the end lines of such claim or patent must be parallel. If there is any comfort to these gentlemen in that last paragraph of the Providence case, they are welcome to it. I say it is premonitory of the decision that will come, just as soon as the next case reaches the Supreme Court of the United States. I say that as a *dictum* of the Supreme Court of the United States, it is entitled to higher weight than the *dictum* it explains, for the rea-

son that it is subsequent in point of time. This *dictum* in the Elgin case has been used by Judge Hawley almost exclusively.

Judge Beatty, an advocate of the old rule, gave extra-lateral rights in the North Star case for the reason that, inasmuch as the reason of the rule of parallelism ceased there, he held that the rule itself ceased, namely, the rule of parallelism being for the purpose of preventing a party from taking more under the ground than he has at the surface, therefore the rule ceases where the end lines converge, because the party will get less under the surface than he has at the surface. Now, that is the ruling, but in my opinion, your Honor, if the rule go that far in the highest court in the land, it will go no farther. As I said before, each and every one of these decisions is based upon the *obiter dictum* in the Elgin case, and it is clear this *obiter dictum* has been explained away by the Supreme Court of the United States itself.

The New Dunderberg v. Old Case.

The next important case that I desire to present to the Court and that I desire to analyze with care, is another one of those great cases standing as lights on the mountain top, separate and apart, and it is a case that goes far towards explaining the subject now before the Court.

Judge Lindley read a portion of the case, but he did not read it all. I shall ask the indulgence of the Court

while I re-read it in my own way, that portion which the Judge read, together with a large portion of the case remaining. This case was decided by the Circuit Court of Appeals of the 8th Circuit on March 22, 1897. The Judges were Sanborn and Thayer, Circuit Judges, and Lochren, District Judge. Judge Sanborn delivered the opinion of the Court. Although this decision was rendered early in the year 1897 and "Lindley on Mines" was not issued until the latter portion of that year, it is not discussed in that book.

MR. LINDLEY. Dunderberg v. Old came out after "Lindley on Mines" had gone to press, and that portion of the discussion to which that case refers, had passed out of the press two months before the case was decided.

MR. WRIGHT. This case was a contest over ore within the segment of the Frostberg claim. The end lines of the Frostberg claim were not under discussion.

MR. LINDLEY. That case was cited by me in my opening argument.

MR. WRIGHT. I have already stated that you read a portion of it. Now, the contest here, if your Honor please, was not as to any ore on the dip outside the segment of land owned by the Frostberg people. It was as to ores within the particular segment owned by them. The Frostberg claim was about fifty feet wide. Upon examining the matter, I find that the end lines of the claim were not exactly parallel. There was a divergence of one degree and fifty-eight minutes, but the question of parallelism did not come up in the case so far as the ores in

dispute were concerned. In other words, it was not necessary to a decision of this particular case. But there is so much "meat" in this case, that I would ask your Honor's indulgence while I make a somewhat close analysis of it. I might premise my remarks by saying that the principles discussed here cannot be understood in their entirety by an examination of only the first part of the discussion referring to the Frostberg claim; *the remarks of the Court as to the location called the Dunderberg, must be read in connection with its remarks concerning the Frostberg claim, in order to have a full understanding of the principles laid down in this case.*

I read from New Dunderberg v. Old, 79 Fed. 598:

"But both these claims were located under 'An Act "'granting right of way to ditch and canal owners over "'the public lands and for other purposes,' approved "July 26, 1866, (14 Stat. 251, C. 262). That act gave a "lawful claimant who complied with the provisions of "the statute, the right to the single lode or vein which "he found, and to no other. It is insisted that under the "local laws of Colorado, to which this Act of Congress "referred, the claimant was not required to mark the "boundaries of his claim upon the surface of the ground "when he located it, but was permitted to hold and fol- "low the lode for a distance of 1400 feet in any direction "in which it lay from his discovery shaft, on condition "that he should mark his claim at the point of discovery "by a substantial stake, post or stone monument, having "inscribed thereon the name of the discoverer and the "name of the lode or vein. 14 Stat. 251, Secs. 1, 2. "* * * There was evidence at the trial that the lode "in the possession of the plaintiff in error within the "boundaries of the Frostberg claim was the same lode "which was originally discovered and located in the Dun- "derberg claim in 1867. The Act of Congress of May 10,

"1872, * * * under which the patents to both "claims were issued, provided 'that the locators of all "'mining locations heretofore made * * * where "'no adverse claim exists at the passage of this "'act, * * * shall have the exclusive right of pos- "'session and enjoyment of all the surface included "'within the lines of their locations and of all veins, "'lodes and ledges throughout their entire depth the top "'or apex of which lies inside of such surface lines ex- "'tended downward vertically' (Section 3); that sections "1, 2, 3, 4 and 6 of the act of July 26, 1866, be repealed "but that such repeal should not affect existing rights; "that applications for patents for mining claims then "pending should be prosecuted to a final decision in the "general land office; and that, where adverse rights were "not affected thereby, patents should issue in pursuance "of the Act of May 10, 1872. The contention of the coun- "sel for the plaintiff in error is that the grant in the "Frostberg patent of every vein whose apex lies within "its exterior boundaries, was void except as to the orig- "inal Frostberg claim discovered therein, because that "claim was located under the Act of 1866 which allowed "the discoverer but a single lode or vein; and the loca- "tion of the Dunderberg vein in 1867 constituted a claim "adverse to the Frostberg when the Act of 1872 was "passed, and in that way deprived the officers of the Land "Department of all power to make a grant to the owner "of the Frostberg of any other vein than that which he "originally discovered. If this proposition is sound, the "plaintiff in error was entitled to the vein on the premises "in dispute, if it was in fact the original Dunderberg "vein and was not the original Frostberg vein, and the "Court should have submitted this question to the jury. "It refused to do so, and the correctness of this ruling "is the most important question in this case. If it be "conceded, however, that there was an adverse claim to "the property described in the Frostberg patent when "the Act of May 10, 1872, was passed, that fact could not "render void any part of the grant made by that patent.

"Congress did not remit the determination of the ques-
"tions whether or not there was an adverse claim to the
"Frostberg or whether the patent to it under the Act of
"1872 would affect adverse rights, to the courts of law or
"of equity in the first instance. On the other hand it
"vested the officers of the Land Department with the
"judicial power and imposed upon them the duty to de-
"cide these questions and to issue the patent to the Frost-
"berg mining claim in accordance with the decision
"which they should render."

Necessarily, if your Honor please, if there were adverse claims, then the patent could not issue under the Act of May 10, 1872, but if there were none—if the Land Office should decide that there were no adverse claims—then the patent might issue under the Act of 1872 instead of under the Act of 1866.

I read further:

"It is true that a patent issued by the Land Depart-
"ment of the United States to land over which that de-
"partment has no power of disposition and no jurisdic-
"tion to determine the claims of applicants for, under
"the acts of Congress, is absolutely void and conveys no
"title whatever."

And now I read the special comments of the Court:

"The act of July 26, 1866, provided that any claimant
"of a lode or vein might file a diagram of the same so
"extended laterally or otherwise as to conform to the
"local laws, customs, and rules of miners and might en-
"ter such tract and receive a patent therefor, with a
"right to the vein or lode; that upon the filing of this dia-
"gram and the posting of the same and a notice of inten-
"tion to apply for a patent, the Register of the local land
"office should post and publish the notice 90 days; that,
"if no adverse claim had then been filed, the Surveyor

"General should, on the application of the party, survey "the premises, make a plat thereof, designate the num- "ber and description of the location, and the improve- "ments and character of the vein, and indorse his ap- "proval thereon, and that upon the filing of this plat and "of proof that the diagram and notice had been duly "posted, the Register should transmit the plat and de- "scription to the General Land Office, and the applicant "should receive a patent for the lode and land claimed. "14 Stat. 251, 252, C. 262, Secs. 2, 3. The claimant of the "Frostberg lode had done all this before the Act of 1872 "was passed."

Now I desire to draw a parallel, as we go along, with the case at bar. The final receipt in the Frostberg case was issued, as Judge Lindley stated on Monday, within a few days of the issuance of the final receipt in the Pioneer case.

I read further:

"He had designated the boundaries of his claim. It had "been surveyed and marked on the ground. His notice "of intention to apply for a patent for it had been given. "No adverse claim had been filed in the Land Office and "on February 27, 1872, he had entered it for patent. "When the Act of 1872 was passed he was already en- "titled to the Frostberg lode, and to the surface de- "scribed in his claim under the Act of 1866."

Your Honor will please bear in mind that this decision is referring solely to lodes within the surface boundaries of the Frostberg claim extended downward vertically. The Court goes no further in the decision than that. And so in the case at bar we concede that at the time the Act of May 10, 1872 was passed, the owners of the Pioneer claim owned the Pioneer lode within the segment—with-

in the perpendicular boundaries of that segment known as Lot No. 48 extended downward indefinitely.

I read further:

"Section 3 of the Act of May 10, 1872, * * * pro-
"vided that all locators of mining locations theretofore
"or thereafter made where no adverse claim existed at
"the time of the passage of that act should have the ex-
"clusive right to all veins or lodes whose apexes were
"within their surface boundaries. Section 9 of that act
"provided that sections 1, 2, 3, 4 and 6 of the act of July
"26, 1866, * * * were repealed; that such repeal
"should not affect existing rights and that 'applications
"'for patents for mining claims now pending may be
"'prosecuted to a final decision in the General Land
"'Office but in such cases where adverse rights are not
"'affected thereby patents may issue in pursuance of
"'the provisions of this act.' THESE PROVISIONS
"OF THE ACTS OF CONGRESS LEAVE NO DOUBT
"THAT THE LAND DEPARTMENT HAD JURISDIC-
"TION TO HEAR AND DETERMINE THE CLAIMS
"OF APPLICANTS FOR AND TO DISPOSE OF THIS
"MINING CLAIM AND EVERY VEIN OR LODE
"WHOSE APEX LAY INSIDE OF ITS SURFACE
"LINES EXTENDED DOWNWARD VERTICALLY.
"When the Act of May 10, 1872 was passed, the Frost-
"berg claim had been located and the application for the
"patent to it was pending. THAT ACT BY ITS VERY
"TERMS IMPOSED UPON THE OFFICERS OF THE
"LAND DEPARTMENT THE DUTY OF HEARING
"THE EVIDENCE UPON AND DECIDING THE
"QUESTIONS WHETHER OR NOT ANY CLAIM AD-
"VERSE TO THAT LOCATION EXISTED AT THE
"TIME OF ITS PASSAGE, AND WHETHER OR NOT
"ANY ADVERSE RIGHTS WOULD BE AFFECTED
"BY ISSUING THE PATENT ACCORDING TO THE
"PROVISIONS OF THE ACT OF 1872. THESE QUES-
"TIONS WERE NECESSARILY DETERMINED BY

"THE OFFICERS OF THAT DEPARTMENT BE-
"FORE THEY ISSUED THIS PATENT. THE PAT-
"ENT WHICH THE DEPARTMENT ISSUED IN 1876
"WAS A JUDGMENT OF THAT TRIBUNAL THAT
"NO SUCH CLAIM DID EXIST ON MAY 10, 1872,
"AND THAT NO ADVERSE RIGHTS WOULD BE
"AFFECTED BY ISSUING IT IN ACCORDANCE
"WITH THE PROVISIONS OF THE ACT OF THAT
"DATE. IT IS AT THE SAME TIME A JUDICIAL
"DETERMINATION OF THESE QUESTIONS AND A
"CONVEYANCE OF THE LEGAL TITLE TO EVERY
"LODE OR VEIN WHOSE APEX LAY WITHIN THE
"SURFACE BOUNDARIES OF THE PATENTED
"CLAIM EXTENDED DOWNWARD VERTICALLY."

Our opponents in this controversy claim that their rights were crystallized and vested before the passage of the Act of May 10, 1872. But this Court says that the Land Department had jurisdiction to set on foot an inquiry for the very purpose of ascertaining whether a patent could in such a case, be issued under the law of May 10, 1872, one of the provisions of which is that the end lines shall be parallel to each other. The fourth ruling of the Court in the Eureka case, which counsel on the other side will certainly not now deny,—the fourth ruling is to the effect that the old locations were subject to the restrictions of the Act of May 10, 1872. As I said a moment ago, this inquiry was set on foot for the express purpose of ascertaining whether the privileges allowed by the act of May 10, 1872, could be granted in this patent. Now, can it be doubted for one moment that, if an inquiry was set on foot to ascertain whether certain privileges arising under that Act could be granted, it was the duty of the

Land Department at the same time, at the instance of the owners, to make such a change as would allow them these extra-lateral rights? Beyond peradventure it would have allowed them to draw in their end lines if they had so desired. Of course, as in the case at bar, the Land Department could issue a patent to the *land*, but if the owner of the land did not come forward and ask for the privilege of everlastingly securing his title to the outside portions of the lode, by making his end lines parallel so as to comply with the provisions of Section Two of the Act of 1872, how could he come in under the provisions of Section Three of the act? Can it be asserted here that he has a right to these privileges?

These rights were not crystallized. It was the duty of the Land Department to make this inquiry. The Act of May 10, 1872, was upon the statute books. Ignorance of the law excuses nobody. And if the owner of the Pioneer Mine was content to sit still and allow his rights and privileges under the act of 1872 to float away from him; if he chose by his own *laches* to let these great privileges pass by, can he come now and ask that this Court restore them to him?

These cases and this Dunderberg case particularly, throw a great deal of light upon this subject. As I said before, one of the questions to be decided by the Land Department was whether this patent could be issued under the act of May 10, 1872. This Court says it was the duty of the Land Department to make a judicial investigation of the facts necessary and decide that question. Now the

owner of the Pioneer Mine had notice of that fact the same as the Land Department, and if he slept upon his rights, he had no one to blame but himself, and the plaintiff here cannot now be heard to ask for rights that were lost by the negligence of its predecessor in title.

I know counsel will be heard to say, as he has said before, that this statute refers only to the special privileges to be conferred; but I say that, according to the elementary principles of law, and under the provisions of this statute construed line by line, the privileges of the statute can only be enjoyed when the owner of the property is subjected to its restrictions; its privileges and its restrictions go hand in hand. We hear nothing of an investigation as to parallel end lines in the New Dunderberg case, because that particular question was not before the Court. The particular question was whether ownership of the special privileges permitted by the Act of 1872 could be enjoyed, whether the owner of the Frostberg claim owned those additional lodes, and, according to the Court, it took a judicial inquiry by the Land Department to determine the facts—to determine the facts necessary to enable it to act in the particular manner followed.

In the Pioneer case it is clear from a reading of the patent itself that that same investigation was had, because there is a grant of those additional lodes in the Pioneer patent.

In this connection, I may be permitted to say that investigations in the Land Department after final receipt

is issued, are matters of every day occurrence. It is not true that these rights crystallize and are vested by the issuance of the final receipt. The Land Department holds control until the patent is finally issued; the cancellation of entries is a matter of every day occurrence; and the rule is that third parties purchase subject to the equities between the owner of the final receipt and the government. If a third party choose to buy a final receipt, he may do so, but the government's equities remain. I confess I have no brief on this subject and for the very reason that the volumes of decisions of the Land Department are simply full from one end to the other, of this class of cases. If they were not correct, undoubtedly the Courts would prevent the Land Department from doing any such thing. Writs of mandamus would lie, and writs of prohibition would prevent any such proceeding; but it is a matter of every day occurrence in the Land Department and it holds control in these matters as between the claimant and the government, until the patent is finally issued.

(*At this point the Court adjourned until Thursday, October 20, 1898, at 10 o'clock A. M. when Mr. Wright resumed his argument as follows*):

Review of Dunderberg v. Old, Continued.

If your Honor please, pursuant to my review of the case of New Dunderberg Mining Company v. Old, I will read now the conclusion of the Court upon the facts re-

viewed yesterday, which were merely a résumé of the law governing the right of the Courts to review patents:

"Our conclusion is that a patent issued under and in "accordance with the provisions of the Act of May 10, "1872, * * * to a mining claim located before the "passage of that act, conveys the legal title to every vein "or lode of mineral whose apex is within its surface lines "extended downward vertically, and is not subject to "collateral attack in an action at law, either on the "ground that there was a claim adverse to that patent "when the act of 1872 was passed, or on the ground that "adverse rights were affected by its issue under the pro-"visions of that act."

Your Honor will remember that it was shown in my review yesterday, that this was because jurisdiction was conferred upon the Land Office by the Act of 1872 itself, to open up the subject and to settle and determine the questions necessary to a decision that the patent could be issued under the Act of 1872.

The Court then takes up the title of the New Dunderberg lode and says:

"Moreover, neither the plaintiff in error nor its im-"mediate or remote grantor was ever in a position to "attack the Frostberg patent, either at law or in equity, "at any time after the patent to the Dunderberg claim "was issued, on September 16, 1873. Conceding, but not "deciding, that the locator of the Dunderberg claim, in "1867, then had the right, under the Act of 1866, to follow "the Dunderberg lode in any direction from his discovery "shaft in which it lay, he renounced that right when he "availed himself of the benefits of the Act of 1872, and "accepted his patent under that statute."

Observe the language of the Court, if your Honor

please. "He renounced that right when he availed him-"self of the benefits of the Act of 1872 and accepted his "patent under that statute." Under the old régime it was one of the most cherished doctrines among the miners that they had a right to locate the lode and to claim it and to work it as they saw fit, in any direction from a given point. This right was swept away by the act of 1872 and by the decision in the Flagstaff case. The Court go on to say:

"That act"—to wit, the act of 1872—"provided that "he might obtain a patent according to its terms, or that "he might retain the rights he had acquired under the "act of 1866."

Now, here is a clear and frank judicial expression of the position of the defendant here; of the claim we make that the patent must issue one way or the other; that it necessarily follows from the language of the statute itself, that where applications were pending when the Act of 1872 was passed, patents may issue under the provisions of the Act of 1866, or if no adverse rights had intervened, then the patent may issue under the Act of 1872; but that it cannot issue under both acts in the sense that both acts shall be controlling. One or the other must control. This whole discussion has shown, and I think clearly, that the Act of 1872 must control. Even the Eureka case, the decision brought forward by Mr. Lindley himself, shows that to be the rule.

The fourth ruling in the Eureka case lays it down beyond peradventure. That ruling has never been overturned any where and it is firmly established that is the rule.

I quote again the Court's language in the New Dunderberg case:

"THAT ACT PROVIDED THAT HE MIGHT "OBTAIN A PATENT ACCORDING TO ITS TERMS "OR THAT HE MIGHT RETAIN THE RIGHTS HE "HAD ACQUIRED UNDER THE ACT OF 1866."

Here is a clear implication that if he had any extraordinary rights under the act of 1866 which he might have maintained under that act, he renounced them when he accepted his patent under the act of 1872, and that is all we claim in the case at bar.

The Court goes on to say:

"He could not obtain a patent, however, under either "act until he located the boundaries of his claim upon "the surface of the ground and limited his claim by those "boundaries. We have already seen that the Act of 1866 "required such a location before a patent could issue. "The Act of 1872 required the applicant for a patent to "file his application with a plat or field notes of the claim "by the Surveyor General, showing accurately the bound-"aries of his claim. It required him to post a copy of "the plat and of the notice of his application for a patent "on the land claimed, and it required him to file a copy "of this notice and proof of the posting in the local land "office. The register of that office was then required to "post and publish notice of the application for sixty days, "and thereupon a patent issued if no adverse claim was "filed. * * * That act provided that the patentee "under it should have the right to all lodes and veins "whose apexes were within the surface boundaries of his "claim. The patentee of the Dunderberg lode located his "claim, and accepted a patent for it, under the terms of "this act."

Now, your Honor will notice that the word "locate" is not used here in the sense of making an original location. It means the location of the claim for patent. The original location of this claim was made long before the act of 1872 was passed, but the location intended is such a location as is made by the Surveyor General at the time of the application for patent.

"He located it upon a tract of land which included his "discovery shaft, and was 3,000 feet long from north to "south, and 70 feet wide from east to west. It may be "that he could have held the Dunderberg lode within "the surface boundaries of the Frostberg claim if he had "so located his claim upon the surface of the ground "that the apex of the Dunderberg lode within the Frost-"berg claim would have been within the exterior bound-"aries of the Dunderberg claim upon the surface, but he "did not do so. He chose to so locate it that his lode "crossed both the side lines of his claim diagonally on "its strike, and passed out of the claim more than 300 "feet before it entered the Frostberg claim. The claim "of his grantee now is that it can renounce this location."

Observe the parallelism with the case at bar. The claim is made by the grantee, as in the case at bar, by the grantee and not by the original patentee.

"The claim of his grantee now is that it can renounce "this location and the limitations of the law and the "patent upon which it is based, and follow the lode "wherever it leads, as the discoverer might have done "when he first found it, and before he located his claim "to the surface at all."

Just as here, where the plaintiff makes a claim that it can renounce the claim which its predecessor in interest

made and the limitations of law attaching to that location, and the patent upon which it is based, and that it can claim this extraordinary right, notwithstanding the fact that its predecessor in interest made this location in this form (showing as on diagram Q) and allowed it to remain more than three months after the Act of 1872 had passed, laying down the law and the limitation.

"It bases this claim upon the provision of Section 9 of "the act of May 10, 1872, * * * that the repeal of "sections 1, 2, 3, 4 and 6 of the act of July 26, 1866, "* * * shall not affect existing rights. BUT IT "WAS NOT THE REPEAL OF THESE SECTIONS "OF THE ACT OF 1866 THAT AFFECTED THE "RIGHTS OF THE OWNER OF THE DUNDERBERG "LODE. THAT REPEAL DID NOT DEPRIVE HIM "OF ANY RIGHT HE HAD TO FOLLOW HIS LODE "INTO THE FROSTBERG CLAIM. IT WAS HIS LO-"CATION, ENTRY AND PATENT OF HIS CLAIM, "FROM WHICH THE LODE DEPARTED ON ITS "STRIKE THREE HUNDRED FEET BEFORE IT "REACHED THE FROSTBERG, THAT AFFECTED "HIS RIGHTS. The act of 1872 required the applicant "for a patent to locate his claim on the surface of the "ground as a condition precedent to its issue, and it de-"clared what rights he should acquire thereby for the "express purpose of defining, fixing and limiting his "claims and his rights."

Now, that is the purpose, if your Honor please, of all patents; the purpose is to define, fix and limit the claims and rights of the party holding a mining claim under the patent.

"Under that act, the location of a mining claim on the "surface of the ground and its entry for patent is a notice

"to the government and the public that the owner claims "all the exclusive rights and privileges granted by the "act; BUT IT IS NO LESS A NOTICE AND A LEGAL "NOTICE THAT HE RENOUNCES AND ABANDONS "TO THE GOVERNMENT ALL OTHER RIGHTS AND "PRIVILEGES PERTAINING TO HIS DISCOVERY "OF THE LODE FOR WHICH HE ASKS THE "PATENT."

And so we say here that, when the predecessor in interest of the plaintiff permitted this mine to go to patent under the act of 1872, that was a notice to the government and the public that the owner claimed all the exclusive rights and privileges granted by the act of 1872; but that it was no less a notice, and a legal notice that it renounced and abandoned to the government all other rights and privileges pertaining to its discovery of the lode for which it asked a patent, including the extra-lateral right.

The Court go on to say:

"It would work manifest injustice to permit one who has "located, and excluded all others from a claim of the full "size allowed by the acts of congress, and from all veins "whose apexes lay within its surface, to follow the lode "upon the discovery of which that claim was based at "right angles to his location, and without its side lines "for a distance equal to the length of his claim. IN OUR "OPINION, THE ACTS OF 1866 AND 1872 CONFER "NO SUCH PRIVILEGE. A CLAIMANT WHO DIS-"COVERED AND LOCATED A LODE MINING "CLAIM UNDER THE ACT OF 1866, RENOUNCES "AND ABANDONS ALL RIGHTS AND PRIVILEGES "TO FOLLOW HIS LODE ON ITS COURSE BEYOND "THE EXTERIOR LINES OF HIS PATENTED "CLAIM, WHEN HE LOCATES IT UPON THE SUR-"FACE OF THE GROUND, ENTERS IT AND

"ACCEPTS A PATENT FOR IT UNDER THE ACT "OF MAY 10, 1872."

Can it be possible that this great right was renounced by accepting the patent under the Act of 1872 and that the right claimed here is retained? Certainly not. The rule of law is necessarily the same in both instances.

Then follows merely a repetition of the rule in the Flagstaff case as to the side lines being the end lines when the lode crosses the claim at right angles.

Now, here, if your Honor please, as I said before, is one of the great cases marking progress—marking a particular step in the evolution of the mining law. There is no declaration of a new principle here; it is merely the enunciation of a principle found within the statute itself, and found within the practice of the Land Department under the decisions of the United States Supreme Court.

The Del Monte v. Last Chance Case.

I come now to the presentation of what is perhaps the greatest, as it is certainly the most interesting, of all the mining decisions. I refer to the case of Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55. I have no doubt your Honor will read this case with more than ordinary care, because it is such a full and clear exposition of the principles of the mining law, and was apparently intended by the Court to leave every point so clear that there can be no mistaking what the Court means.

I shall not read all or even a large proportion of this decision. It is very long and I shall read only a certain

few of the principles laid down in it, such as I think are applicable to this particular discussion.

The Court first reviews the various enactments touching upon the subject of mining. It then reviews the history of the locations made under the Act of 1866, and uses as its illustration a location made in the shape of a broom, the body of the broom representing the surface of the land located, and the handle representing the lode line, and it then takes up the Flagstaff case as showing—I think it is well for me to read what it says on that point:

"Even under this statute," the Court says, "although "its express purpose was primarily to grant the single "vein, YET THE RIGHTS OF THE PATENTEE BE-"NEATH THE SURFACE WERE LIMITED AND "CONTROLLED BY HIS RIGHTS UPON THE SUR-"FACE. If, in fact, as shown by subsequent explora-"tions, the vein on its course or strike departed from the "boundary lines of the surface location, the point of de-"parture was the limit of right. In other words, he was "not entitled to the claimed and patented number of feet "of the vein, irrespective of the question whether the "vein in its course departed from the lines of the surface "location."

Then follows a review of the Flagstaff litigation. I have already read so much from that case, that it is unnecessary to repeat the language as it is cited here. The Court deduces from its review of that case, however, the following:

"These decisions"—McCormick v. Varnes, 2 Utah 355, and the Flagstaff case—"show that while the express "purpose of the statute was to grant the vein for so

"many feet along its course, yet such grant could only "be made effective by a surface location covering the "course to such extent. This act of 1866 remained in "force only six years, and was then superseded by the "Act of May 10, 1872, * * * found in the Revised "Statutes, sections 2319 and following. This is the "statute which is in force to-day, and under which the "controversies in this case arise."

To recur for a moment to the language which has been read just now:

"THESE DECISIONS SHOW THAT WHILE THE "EXPRESS PURPOSE OF THE STATUTE WAS TO "GRANT THE VEIN FOR SO MANY FEET ALONG "ITS COURSE, YET SUCH GRANT COULD ONLY BE "MADE EFFECTIVE BY A SURFACE LOCATION "COVERING THE COURSE TO SUCH EXTENT."

Now it is universally conceded that this applies to the length of the vein on its course, but under a statute which only allows so many feet of the lode, is there not a clear necessity, if your Honor please, for a method of definition of those feet? In other words, is there not a clear necessity for a definition of the end lines, or the end bounding planes, as we now call them? And was any stable and certain method of definition ever invoked except by the lines of the surface plat itself? There never was, and if a locator has been so unfortunate as not to define his end lines, has the Court the right to make end lines? All the decisions say otherwise, and this decision says so particularly, as I will show to your Honor presently.

It is our contention that without a rule such as we claim, there is no definition of the extra-lateral right or description of the segment of the vein intended to be conveyed. The statute of 1866 provided no means of definition excepting the location on the surface and no other means has ever been devised or permitted by any statute since.

The Court next cites the first section of the Act of 1872. This section is the same in substance as the first section of the Act of 1866. I will read these sections. For the purpose which I will call to your Honor's attention presently, it is important to know that the first section of the Act of 1866 and the first section of the Act of 1872, are substantially the same.

"All valuable mineral deposits in lands belonging to "the United States, both surveyed and unsurveyed, are "hereby declared to be free and open to exploration and "purchase, and the lands in which they are found to oc- "cupation and purchase, by citizens of the United States "and those who have declared their intention to become "such, under regulations prescribed by law, and accord- "ing to the local customs or rules of miners in the sev- "eral mining districts, so far as the same are applicable "and not inconsistent with the laws of the United "States."

This is the first section of the Law of May 10, 1872, and I particularly call your Honor's attention to the fact that these locations are necessarily made upon lands of the United States whether made under the Act of 1866 or under the Act of 1872. It cannot be otherwise. These privileges could not be granted by the government upon

private land, and of course the land must be public land.

I am aware that there is an idea prevalent in some sections of the mining community that the extra-lateral right is a natural right. This idea is stated in a somewhat definite form in the case of Doe v. Sanger, 83 Calif. 203. I do not intend to read from it, but merely state that this idea prevailed to such an extent as to get into the decisions of the Courts. The decision was written by Judge McFarland, and he takes ground as though the extra-lateral right were as much a part of the common law of the land as the right to go down vertically from the surface to the center of the earth, when you own the surface.

But let us see what the Supreme Court of the United States says on this point. I read further from the Del Monte case the comments of the Court on the section of the statute just quoted:

"It needs no argument to show that if this were the "only section bearing upon the question, patents for land "containing mineral, would, except in cases affected by "local customs and rules of miners, be subject to the "ordinary rules of the common law, and would convey "title to only such minerals as were found beneath the "surface."

I submit to your Honor that that of itself would be a great privilege. Is there any other government on the face of the earth that has permitted its citizens to go under its soil and take out these crown minerals, except the government of the United States? Would not that be a much greater privilege than was to be expected?

Even under the law of England, as your Honor well remembers, the gold and silver were reserved, even when the fee was granted. They were crown minerals, but our government with open hand allows a man to take everything under the surface. Would not that be a sufficient privilege?

Are the citizens of this country in a position to *demand* this most extraordinary privilege, not only of taking the gold and silver from under their own soil but to go under the soil of their neighbors and take them there also? It is only the generosity of our government that has permitted this extraordinary privilege under any circumstances.

And the Court now proceeds to define the circumstances under which this privilege may be exercised:

"We therefore turn to the following sections to see "what extra-lateral rights are given and upon what con- "ditions they may be exercised. And it must be borne "in mind in considering the questions presented that we "are dealing simply with statutory rights. There is no "showing of any local customs or rules affecting the rights "defined in and prescribed by the statute, AND BE- "YOND THE TERMS OF THE STATUTE COURTS "MAY NOT GO. THEY HAVE NO POWER OF LEG- "ISLATION. THEY CANNOT ASSUME THE EXIST- "ENCE OF ANY NATURAL EQUITY, AND RULE "THAT BY REASON OF SUCH EQUITY A PARTY "MAY FOLLOW A VEIN INTO THE TERRITORY "OF HIS NEIGHBOR, AND APPROPRIATE IT TO "HIS OWN USE. If cases arise for which Con- "gress has made no provision, the courts cannot "supply the defect. CONGRESS HAVING PRE- "SCRIBED THE CONDITIONS UPON WHICH

"EXTRA-LATERAL RIGHTS MAY BE ACQUIRED, "A PARTY MUST BRING HIMSELF WITHIN "THOSE CONDITIONS OR ELSE BE CONTENT "WITH SIMPLY THE MINERAL BENEATH "THE SURFACE OF HIS TERRITORY: It is undoubt- "edly true that the primary thought of the statute is the "disposal of the mines and minerals, and in the interpre- "tation of the statute this primary purpose must be "recognized and given effect. Hence, whenever a party "has acquired the title to ground within whose surface "area is the apex of a vein with a few or many feet along "its course or strike, a right to follow that vein on its dip "for the same length ought to be awarded to him if it "can be done, and ONLY IF IT CAN BE DONE, UNDER "ANY FAIR AND NATURAL CONSTRUCTION OF "THE LANGUAGE OF THE STATUTE. If the sur- "face of the ground was every where level and veins con- "stantly pursued a straight line, there would be little "difficulty in legislation to provide for all contingencies; "but mineral is apt to be found in mountainous regions, "where great irregularity of surface exists, and the "course or strike of the veins is as irregular as the sur- "face, so that many cases may arise in which the statu- "tory provisions will fail to secure to a discoverer of a "vein such an amount thereof as equitably it would seem "he ought to receive. We make these observations be- "cause we find in some of the opinions assertions by the "writers that they have devised rules which will work "out equitable solutions of all difficulties."

I have no doubt the Court in this language referred to the case of King v. Amy, 24 Pac. 200, where Judge De-Witt, who wrote the opinion for the Montana Supreme Court, worked out a system which seems to me the best possible for the solution of these mining questions. It is most ingenious, it is extremely interesting, and I think it probably met the general approval of the bar at the

time the decision was rendered and before it went to the Supreme Court of the United States.

I read further:

"Perhaps those rules may have all the virtues which "are claimed for them, and if so it were well if Congress "could be persuaded to enact them into statute; but be "that as it may, THE QUESTION IN THE "COURTS IS NOT, WHAT IS EQUITY? BUT "WHAT SAITH THE STATUTE? Thus, for in- "stance, there is no inherent necessity that the end lines "of a mining claim should be parallel, YET THE STAT- "UTE HAS SO SPECIFICALLY PRESCRIBED. (SEC- "TION 2320). IT IS NOT WITHIN THE PROVINCE "OF THE COURTS TO IGNORE SUCH PROVISION, "AND HOLD THAT A LOCATOR, FAILING TO COM- "PLY WITH ITS TERMS HAS ALL THE RIGHTS, "EXTRA-LATERAL AND OTHERWISE, WHICH HE "WOULD HAVE BEEN ENTITLED TO IF HE HAD "COMPLIED, AND SO IT HAS BEEN ADJUDGED. "Iron Silver Mining Company v. Elgin Mining & S. Com- "pany, 118 U. S. 196. This case, which is often called "the 'Horseshoe Case,' on account of the form of the "location, is instructive. The following diagram, which "was in the record in that case, illustrates the scope of "the decision:" (Here follows diagram of the Stone claim as shown in Diagram J.) "The locator "claimed in his application for a patent the "lines 1, 14 and 5, 6, as the end lines of his lo- "cation, and because of their parallelism, that he had "complied with the letter of the statute, but the Court "ruled against him, saying in the opinion (page 208): "'The exterior lines of the Stone claim formed a curved "'figure somewhat in the shape of a horseshoe, and its "'end lines are not and cannot be made parallel. What "'are marked on the plat as end lines are not such. The "'one between numbers 5 and 6 is a side line. The "'draughtsman or surveyor seemed to have hit upon two

" ' parallel lines of his nine-sided figure, and apparently
" ' for no other reason than their parallelism called them
" ' end lines.

" ' We are therefore of opinion that the objection that,
" ' by reason of the surface form of the Stone claim, the
" ' defendant could not follow the lode existing therein
" ' in its downward course beyond the lines of the claim,
" ' was well taken to the offered proof.' "

After this quotation from the Elgin case, the Court in the Del Monte case goes on to say:

" It is true the Court also observed that if the two
" lines named by the locator were to be considered the
" end lines," (showing as on Diagram J) " no part of the
" vein in controversy fell ' within the vertical planes
" ' drawn down through those lines ' " (referring to Diagram J) " ' continued in their own direction.' But not-
" withstanding this observation, the point of the decision
" was that the lines, which were the end lines of the lo-
" cation as made on the surface of the ground, were not
" parallel, and that this defect could not be obviated by
" calling that which was in fact a side line, an end line.
" This is made more clear by the observations of the
" Chief Justice, who with Mr. Justice Bradley, dissented,
" in which he said:"—

I have already read this dissenting opinion to your Honor in another part of this discussion, and your Honor is aware that it is to the effect that the end lines should be drawn through the end points at right angles to the general course of the lode.

And so, after it has been claimed perhaps hundreds of times that the gist of the decision in the Elgin case, was that, inasmuch as the end lines that were marked upon the map as such did not include the ground in dispute,

therefore plaintiff could not recover, now we have the matter explained by the Supreme Court saying that the Elgin case meant exactly what it said when it said that the end lines of a claim must be parallel in order that there should be an extra-lateral right.

Following its quotation of Chief Justice Waite's dissenting opinion, the Court says:

"In other words, the Court took the location as made "on the surface by the locator, determined from that "what were the end lines, and made those surface end "lines controlling upon his rights, and REJECTED THE "CONTENTION THAT IT WAS PROPER FOR THE "COURT TO IGNORE THE SURFACE LOCATION "AND CREATE FOR THE LOCATOR A NEW LOCA-"TION WHOSE END LINES SHOULD BE CROSS-"WISE OF THE GENERAL COURSE OF THE VEIN "AS FINALLY DETERMINED BY EXPLORATION."

Now I submit that the plaintiff in the case at bar is demanding that this Court *make a new location* for it at this late day, more than twenty-five years after its claim was patented, and that the Court grant an extra-lateral right in connection with such location.

The Court further comments:

"That this decision and that in the Tarbet case, *supra*, "were correct expositions of the statute, and correctly "comprehended the intent of Congress therein, is evi-"dent from the fact that, although they were announced "in 1885 and 1878, respectively, Congress has not seen fit "to change the language of the statute, or in any manner "to indicate that any different measure of rights should "be awarded to a mining locator."

Then the Court takes up one of the great questions that has been propounded to it by the Court of Appeals below. Your Honor knows that this decision was rendered in answer to four questions propounded by the Court of Appeals for the Eighth Circuit. I presume your Honor is already familiar with the diagram, the Del Monte diagram. (See Diagram H[1]).

THE COURT. Yes, I have examined that somewhat.

MR. WRIGHT. (Reading) "The first is:

"May any of the lines of a junior lode location be laid "within, upon, or 'across the surface of a valid senior "'location for the purpose of defining for or securing to "'such junior location underground or extra-lateral "'rights not in conflict with any rights of the senior "'location?'

"By section 2319, quoted above, the mineral deposits "which are declared to be open to exploration and pur- "chase, are those found in lands belonging to the United "States, and such lands are the only ones open to occu- "pation and purchase."

I have already called your Honor's attention to the similarity between sections 2319 of the Revised Statutes, which is the same as the first section of the Act of 1872, and the first section of the Act of 1866, and the Court here calls particular attention to the fact that these enactments referred to lands that belonged to and are under the control of the United States government.

I read further:

"WHILE THIS IS TRUE, IT IS ALSO TRUE THAT "UNTIL THE LEGAL TITLE HAS PASSED, THE "THE PUBLIC LANDS ARE WITHIN THE JURIS- "DICTION OF THE LAND DEPARTMENT, AND, AL-

Diagram H¹.

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LAST CHANCE
APEX
7263 A.
DEL MONTE
NEW YORK
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b
c
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7356
7406
APEX
l
m

"THOUGH EQUITABLE RIGHTS MAY BE ESTAB-
"LISHED, CONGRESS RETAINS A CERTAIN MEAS-
"URE OF CONTROL. MICHIGAN LAND & LUMBER
"COMPANY vs. RUST, 168 U. S. 589. THE GRANT IS,
"AS IS OFTEN SAID, IN PROCESS OF ADMINIS-
"TRATION. Passing to section 2320, beyond the recog-
"nition of the governing force of customs and regula-
"tions and a declaration as to the extreme length and
"width of a mining claim, IT IS PROVIDED THAT 'NO
"'LOCATION OF A MINING CLAIM SHALL BE
"'MADE UNTIL THE DISCOVERY OF THE VEIN
"'OR LODE WITHIN THE LIMITS OF THE CLAIM
"'LOCATED. * * * THE END LINES OF EACH
"'CLAIM SHALL BE PARALLEL TO EACH
"'OTHER.'"

Here, if your Honor please, is the doom of the plaintiff in the case at bar, in the paragraph I have just read, unmistakably. Can counsel for the plaintiff by any ingenuity, show to this Court that the title of the Pioneer Mine was not "in process of administration," within the meaning of the Court's language, at the time of the passage of the Act of 1872? Can he show that it was beyond the jurisdiction of Congress, when even his own authority, the Eureka case, in its most prominent feature, declares that the rights of locators under the Act of 1866 were subject to the provisions of the Act of 1872?

The Michigan v. Rust Case.

I think that before completing my remarks on the Del Monte case, I will read from the case of Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, cited by the Supreme Court in the paragraph I have last read, so as to see whether the Supreme Court of the United States in the Del Monte case knew what it was talking about, and

meant what it said. The Court in the Del Monte case, by the language I have quoted, evidently intended to show the point at which the government relinquishes its control, as owner over a piece of land, a piece of mining land.

The language is to the effect that, until the legal title has passed the lands are within the jurisdiction of the Land Department, and that although equitable rights may be established, Congress retains a certain measure of control and the grant remains in process of administration.

In this case of Michigan Land & Lumber Company against Rust, the lands were granted by Congress and they were surveyed and the claim was made that the fixing of the *locus* by the survey completed the grant, though a new survey was afterwards ordered by the Land Department. The case is a long one and I have consumed so much time that I will read only a portion of it, leaving it for your Honor's special consideration.

The contest was as to when the title of the United States passed, in other words, as to when the title became vested in the individual; and the Supreme Court of the United States says:

"It will be perceived that the act contemplated the "issue of a patent as the means of transferring the legal "title. In Rogers Locomotive Mach. Works v. American "Emigrant Company, 164 U. S. 559, 574, it was said, "speaking in reference to this matter, and after a full re- "view of the previous authorities: 'When he (that is, the "'Secretary of the Interior) made such identification, "'then, and not before, the state was entitled to a patent,

" ' and " on such patent " the fee simple title vested in the " ' state. The state's title was at the outset an inchoate " ' one, and did not become perfect as of the date of the " ' act, until a patent was issued.'

" Generally speaking, while the legal title remains in " the United States, the grant is in process of administra- " tion and the land is subject to the jurisdiction of the " Land Department of the Government."

If your Honor please, if the land is subject to the jurisdiction of the Land Department, how much more is it subject to the jurisdiction and the will of Congress? I read further:

" It is true a patent is not always necessary for the " transfer of the legal title. Sometimes an act of Con- " gress will pass the fee." (Cites authorities). " Some- " times a certification of a list of lands to the grantee is " declared to be operative to transfer such title. (Rev. " Stat. Sec. 2449; Frasher v. O'Connor, 115 U. S. 102). " BUT WHEREVER THE GRANTING ACT SPECIFI- " CALLY PROVIDES FOR THE ISSUE OF A PAT- " ENT, THEN THE RULE IS THAT THE LEGAL " TITLE REMAINS IN THE GOVERNMENT UNTIL " THE ISSUE OF THE PATENT (Bagnell v. Broderick, " 38 U. S., 13 Pet. 426-450); AND WHILE SO REMAIN- " ING THE GRANT IS IN PROCESS OF ADMIN- " ISTRATION, AND THE JURISDICTION OF THE " LAND DEPARTMENT IS NOT LOST."

It is because of this authority, if your Honor please, that I have not chosen to take up the time of the Court in this long argument, by reviewing the authorities presented by counsel on the other side to the contrary doctrine.

MR. LINDLEY. I deny that I have introduced anything to the contrary.

MR. WRIGHT. Well, I am very glad to hear that.

MR. LINDLEY. I have yet to hear of any lawyer that will dispute the law that counsel has just read.

MR. WRIGHT. All right; I make no comment on what counsel has done and the purpose of the citations that he presented to this Court. If I misunderstood the purpose and meaning of those citations, I am very glad of it.

I read further from Michigan v. Rust:

"It is, of course not pretended that when an equitable "title has passed, the Land Department has power to "arbitrarily destroy that equitable title. It has juris- "diction, however, after proper notice, to the party claim- "ing such equitable title and upon a hearing, to deter- "mine the question whether or not such title has passed." (Cites authorities.) "IN OTHER WORDS, THE POWER "OF THE DEPARTMENT TO INQUIRE INTO THE "EXTENT AND VALIDITY OF THE RIGHTS "CLAIMED AGAINST THE GOVERNMENT DOES "NOT CEASE UNTIL THE LEGAL TITLE HAS "PASSED."

This is the law. If the plaintiff's predecessor in interest thought that his patent was not subject to this law, that was his misfortune. He should have known it, and might have known it if he had employed proper counsel. He might have gone into the Land Department and asked that these end lines be made parallel. It is true that it was before the rule was applied in the case of the Tyler claim, which has passed through so much litigation in the United States Courts, and where one end line was drawn in for the very purpose of conferring extra-lateral rights, after the matter got fully within the jurisdiction and

under the control of the Land Department. That feature of the case was fully litigated and the power to so change those lines as to confer extra-lateral rights, was upheld by the Supreme Court of the United States.

MR. LINDLEY. Tyler lost his extra-lateral right.

MR. WRIGHT. He lost a part of it but not by that.

MR. LINDLEY. And that line was drawn in, not for the purpose of defining an extra-lateral right, but for the purpose of obviating a surface conflict on the patent claim.

MR. WRIGHT. Yes, I know, and that by the drawing in of that line the extra-lateral right was made and has been sustained by all the courts.

But to quote again from this case of Michigan v. Rust:

"'A WARRANT AND SURVEY AUTHORIZE "'THE PROPRIETOR OF THEM TO DEMAND THE "'LEGAL TITLE, BUT DO NOT, IN THEMSELVES "'CONSTITUTE A LEGAL TITLE. UNTIL THE CON- "'SUMMATION OF THE TITLE BY A GRANT, THE "'PERSON WHO ACQUIRES AN EQUITY HOLDS "'A RIGHT SUBJECT TO EXAMINATION.' Miller "v. Kerr, 20 U. S., 7 Wheat. 1, 6. After the issue of the "patent the matter becomes subject to inquiry only in "the Courts and by judicial proceedings." (Cites authorities). "This jurisdiction of the department has been "maintained in cases of pre-emption where the entire "purchase money has been paid and a receiver's final "certificate issued." (Cites authorities.)

If a clincher were needed, it seems to me we have it here in this particular case, as we are bound to admit that the purchase money in the case at bar had already been paid when the Act of 1872 was passed.

Now I think I would but waste the time of the Court if I read further from this Michigan v. Rust case. It is a long and thoroughly considered case, decided after the fullest discussion; and the Supreme Court meant what it said there, and when it decided in this case of Del Monte Mining & Milling Company against the Last Chance, that in a mining case as well as in other cases of the public lands, the land does not depart from the control of the Land Department, much less does it depart from the control of the Congress of the United States, until the patent itself is issued.

Belk v. Meagher and Gwillim v. Donellan.

Your Honor made an inquiry of me yesterday with reference to the case of Belk v. Meagher. This Del Monte case refers to that case, and also to the language I have quoted from the case of Gwillim v. Donellan, as they play a part here in the application of the rule I have just read; and I will read to your Honor what the Court itself considers the gist of those two decisions. It quotes from the case of Belk v. Meagher, 104 U. S. 279, 284, as follows:

"Mining claims are not open to re-location until the "rights of a former locator have come to an end. A re-"locator seeks to avail himself of mineral in the public "lands which another has discovered. This he cannot "do until the discoverer has in law abandoned his claim, "and left the property open for another to take up. The "right of location upon the mineral lands of the United "States is a privilege granted by Congress, but it can "only be exercised within the limits prescribed by the "grant. A location can only be made where the law al-

"lows it to be done. Any attempt to go beyond that "will be of no avail. Hence a re-location on lands "actually covered at the time by another valid and sub- "sisting location is void; and this not only against the "prior locator, but all the world, because the law allows "no such thing to be done."

And again it quotes from Gwillim v. Donellan, 115 U. S. 45, 49:

"A valid and subsisting location of mineral lands made "and kept up in accordance with the provisions of the "statutes of the United States, has the effect of a grant "by the United States of the right of present and exclu- "sive possession of the lands located. If, when one "enters on land to make a location, there is another loca- "tion in full force, which entitles its owner to the exclu- "sive possession of the land, the first location operates as "bar to the second."

Now these two citations are used here by the Supreme Court for the purpose of showing the full effect and meaning of a location, to show how far a location, as a location, vests title in the locator; and, as your Honor will see, the language is very strong, especially that in Gwillim v. Donellan. It would look as though, taking the language of that case by itself, a location were as effectual in passing title as a patent itself; that it gave to the owner of the location an exclusive ownership, and vested the title in him as effectually as a patent itself.

Now in this discussion I think I have shown very clearly that that could not have been the meaning of the Court, because in the Flagstaff case there was a location under the old law, and it went to patent and a part of the old location was swept away by that decision.

Review of the Del Monte Case, Continued.

Now, if that location, which had been kept up, operated as an investiture of title so as to create a vested right, I say the Flagstaff decision would have been impossible. These citations, however, and this reference to the case of Michigan Land & Lumber Company v. Rust, are, as I said, for the purpose of showing at what point the government relinquishes its control over its lands: because this Del Monte decision goes on to show that the government retains its administrative control over the land until the patent passes; and, notwithstanding the strength of the language in the decision of Belk v. Meagher and that in Gwillim v. Donellan, yet the government actually retains to itself, under this Del Monte decision, the right to permit another person, a third person, to go upon located land and to locate and acquire rights by performing certain acts of location upon an already located claim.

Now, I do not wish to be understood as construing this decision to mean that adverse rights could thus be obtained, because the decision itself shows that the acts so permitted are not an interference with or curtailment of the rights of the first locator.

But the decision is to the effect that, in order to make your end lines parallel, so as to obtain an extra-lateral right, which is at all times the underlying purpose of the law—a locator has to see particularly that the end lines of his claim are parallel, so that he may have under the land the full extent of his lode that he has at the surface, and he cannot have any more—in order to carry out this

primary purpose of the law, the government retains its jurisdiction over a location up to the time of the issuance of the patent, and to such an extent as to permit a second locator to go and set his stakes upon located land for the purpose of making parallel the end lines of a second claim.

THIS IS A MOST EXTRAORDINARY RESERVATION AND IT IS VERY MUCH STRONGER THAN THE RESERVATION CLAIMED IN THE CASE AT BAR. IF SUCH A RIGHT IS RETAINED BY THE GOVERNMENT FOR THE PURPOSE OF ENABLING A THIRD PARTY, A STRANGER, TO ACQUIRE THE FULL TITLE PERMITTED TO HIM BY THE MINING LAWS OF THE UNITED STATES, HOW MUCH MORE CERTAIN IT IS THAT THE JURISDICTION OF THE LAND DEPARTMENT IS RETAINED FOR THE PURPOSE OF PERMITTING THE APPLICANT HIMSELF, THE CLAIMANT HIMSELF, TO GO AND MAKE SUCH A RE-ADJUSTMENT OF HIS LINES AS TO MAKE SURE OF THE EXTRA-LATERAL RIGHT. CAN THERE BE ANY DOUBT THAT THE PETITION OF PLAINTIFF'S PREDECESSOR IN TITLE WOULD HAVE BEEN ENTERTAINED BY THE DEPARTMENT AND FAVORABLY ACTED UPON, IF HE HAD MADE IT?

There are in this world, if your Honor please, a great number of people who think themselves above the law; who think that the restrictions of the law are made for other people but not for themselves; and there can be no

doubt that the applicant for this patent was of that class, and that when he read, as he must have read, that provision of the law which states that "the end lines of each "claim shall be parallel to each other," and found that provision a universal provision, one which by its association with the other language of the statute was clearly intended to be universal,—whoever he was that controlled this application, he considered that it was not to apply to him: to some one else, but not to him. And he slept upon his rights, and his successor in interest must bear the penalty.

We have now seen what has become of the doctrine that the statute is "merely directory." This decision is no Eureka decision. This decision says, "it is not within "the province of the Courts to ignore such a provision," and immediately follows the statement that this land remained—because it applies directly here—that this Pioneer mine remained under the control of the Land Department until the issuance of the patent in August, 1872, and immediately thereafter follows in direct and necessary connection the language quoted from the statute itself, "the end lines of each claim shall be parallel to "each other."

All through this Del Monte decision the doctrine of parallelism is paramount. Here is what the decision says further:

"It will also be noticed that the locator is not com-
"pelled to follow the lines of the government surveys, or
"to make his location in any manner correspond to such

" surveys. The location may, indeed, antedate the public " surveys, but whether before or after them, the locator " places his location where, in his judgment, it will cover " the underlying vein. *The law requires that the end lines* " *of the claim shall be parallel.* It will often happen that " locations which do not over-lap are so placed as to leave " between them some irregular parcel of ground. Within " that, it being no more than one locator is entitled to " take, may be discovered a mineral vein and the discov- " erer desire to take the entire surface, and yet it be im- " possible for him to do so and make his end lines parallel " unless, for the mere purposes of location, he be per- " mitted to place those end lines on territory already " claimed by the prior locators."

This privilege is granted by this decision. The major part of the decision is upon that particular point.

I read further:

" To say that the subsequent locator must—when it " appears that his lines are to any extent upon territory " covered by a prior valid location—go through the form " of making a re-location, simply works delay and may " prevent him, as we have seen, from obtaining an amount " of surface to which he is entitled, unless he abandons " THE UNDERGROUND AND EXTRA-LATERAL " RIGHTS WHICH ARE SECURED ONLY BY PAR- " ALLEL END LINES.

Always and every where parallelism. I read further:

" In this connection it may be properly inquired, what " is the significance of parallel end lines? Is it to secure " the locator in all cases a tract in the shape of a parallel- " ogram? Is it that the surveys of mineral land shall be " like the ordinary public surveys in rectangular form, " capable of easy adjustment, and showing upon a plat " that even measurement which is so marked a feature

"of the range, township and section system? Clearly "not. While the contemplation of Congress may have "been that every location should be in the form of a "parallelogram, not exceeding 1,500 by 600 feet in size, "yet the purpose also was to permit the location in such "a way as to secure not exceeding 1,500 feet of the length "of a discovered vein, and *it was expected* that the locator "would so place it as in his judgment would make the "location lengthwise cover the course of the vein. *There* "*is no command* that the side lines shall be parallel and "*the requisition that the end lines shall be parallel* was for "the purpose of bounding the underground extra-lateral "rights which the owner of the location may exercise. "He may pursue the vein downwards outside the side "lines of his location, but the limits of his right are not "to extend on the course of the vein beyond the end lines "projected downward through the earth. His rights on "the surface are bounded by the several lines of his "location, *and the end lines must be parallel in order that go-*"*ing downwards he shall acquire no further length of the vein* "*than the planes of those lines extended downward inclose.* "If the end lines are not parallel, then following their "planes downward his rights will be either converging "and diminishing or diverging and increasing the farther "he descends into the earth. *In view of this pur-*"*pose and effect of the parallel end lines*, it matters not to the "prior locator where the end lines of the junior location "are laid. No matter where they may be, they do not "disturb in the slightest his surface or underground "rights."

And because they do not disturb the underground rights of the prior locator, the Court permits a second locator to go upon the land of a prior locator and erect his stakes.

The Leading Mining Cases.

The Court cites in this decision the cases of Flagstaff v. Tarbet; Iron Silver v. Elgin; Argentine v. Terrible; and

King v. Amy: as the great leading mining cases. There is one strange omission, one that doubtless has already attracted your Honor's attention. We do not see any thing of the Eureka case in this decision. It is not mentioned, but the cases named are the ones the Court cites as containing the gist of the law as it is to-day. The Eureka case is simply passed by. Certain portions of these cases are considered as stating the gist of the law and the Court in a general review sums up as follows:

"All that can be said to have been settled by them is, "first, *that the lines of the location as made by the locator "are the only lines that will be recognized; that the courts "have no power to establish new lines or make a new location;*"—

—and in this connection your Honor will note particularly that some of these cases referred to patents before the Act of May 10, 1872.—

"second, that the contemplation of the statute "is that the location shall be along the course "of the vein, reading, as it does, that a mining "claim '*may equal, but shall not exceed, 1,500 feet in* "'*length along the vein or lode;*' and, third, that when sub- "sequent explorations disclose that the location has been "made not along the course of the vein but across it, the "side lines of the location become in law the end lines."

It is very important to note this last proposition because it shows that these matters may be determined by subsequent explorations, as in the case at bar.

When a Location has the Extra-Lateral Right.

I read again from the Del Monte case:

"We pass, therefore, to an examination of the pro- "visions of the statute. Premising that the discoverer

"of a vein makes the location, that he is entitled to make "a location not exceeding 1,500 feet in length along the "course of such vein and not exceeding 'three hundred "'feet on each side of the middle of the vein at the sur-"'face,' that a location thus made discloses end and side "lines, *that he is required to make the end lines parallel, that by "such parallel end lines he places limits*, not merely to the "surface area, BUT LIMITS BEYOND WHICH BE-"LOW THE SURFACE HE CANNOT GO ON THE "COURSE OF THE VEIN, that it must be assumed that "he will take all of the length of the vein that he can, we "find from section 2322 that he is entitled to 'all veins, "'lodes and ledges throughout their entire depth, the top "'or apex of which lies inside of such surface lines ex-"'tended downward vertically.'"

Here is the summing up of the whole matter; in other words, it is a claim that is located with parallel end lines, where this right exists and in no other kind of claim.

I read again from the Del Monte case:

Conclusions of the Court in the Del Monte Case.

"Our conclusions may be summed up in these proposi-"tions: First, *the location as made on the surface by the locator "determines the extent of rights below the surface.* Second, "*the end lines, as he marks them on the surface*, with the "single exception hereinafter noticed, *place the limits beyond "which he may not go in the appropriation of any vein or veins "along their course or strike.* Third, every vein 'the top, "'or apex of which lies inside of such surface lines ex-"'tended downward vertically' becomes his by virtue of "his location, and he may pursue it to any depth beyond "his vertical side lines, although in so doing he enters "beneath the surface of some other proprietor. Fourth, "the only exception to the rule that the end lines of the "location as the locator places them establish the limits

" beyond which he may not go in the appropriation of a " vein on its course or strike, is where it is developed that " in fact the location has been placed not along, but " across the course of the vein."

Of course as the entire doctrine of this case is parallel end lines, therefore the word parallelism is necessarily implied in this sentence that I have last read.

I read further:

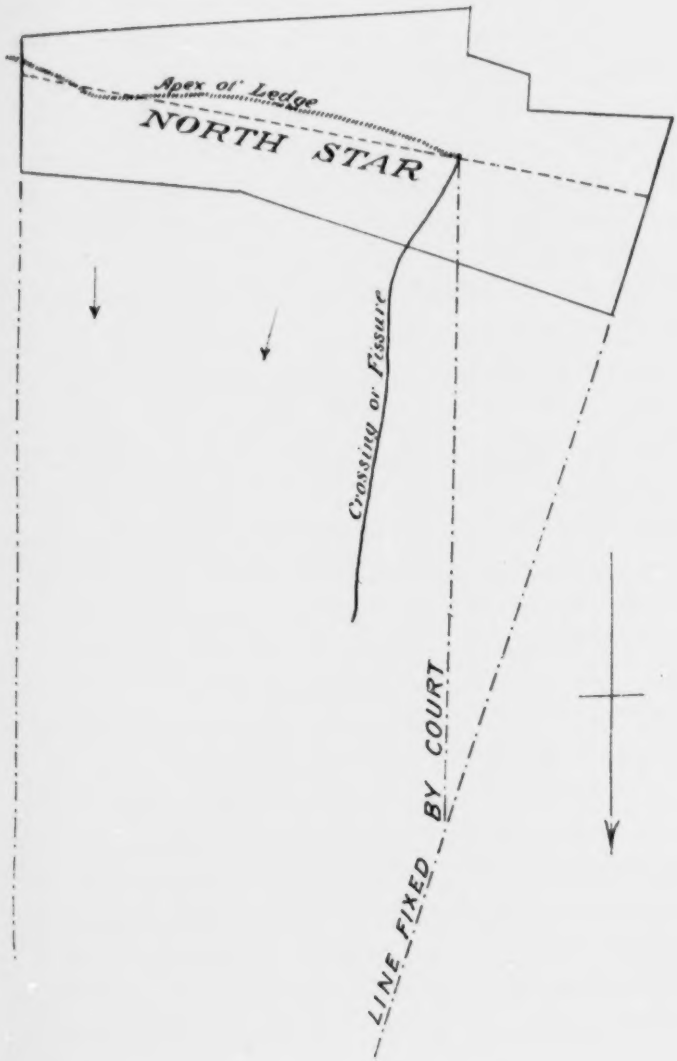
" In such case the law declares that those which the " locator called his side lines are his end lines, and those " which he called end lines are in fact side lines, and this " upon the proposition that IT WAS THE INTENT OF " CONGRESS TO GIVE TO THE LOCATOR ONLY SO " MANY FEET OF THE LENGTH OF THE VEIN, that " length to be bounded by the lines which the locator has " established as his location. 'OUR LAWS HAVE AT- " 'TEMPTED TO ESTABLISH A RULE BY WHICH " 'EACH CLAIM SHALL BE SO MANY FEET OF THE " 'VEIN, LENGTHWISE OF ITS COURSE, TO ANY " 'DEPTH BELOW THE SURFACE, although laterally " 'its inclination shall carry it ever so far from a perpen- " 'dicular.' "

Is there any provision of the law to the effect that it is the intention of the law that a man may have spreading end lines? Where is it? Parallelism everywhere from the Eureka case onward.

The North Star Decision—How Far Approved.

The North Star case that has been referred to several times in this discussion, was approved by the Supreme Court of the United States in this Del Monte case upon the point that where the lode enters at one end line and

Diagram I[1].


Apex of Ledge
NORTH STAR
Crossing or Fissure
LINE FIXED BY COURT

passes into the claim—for instance, supposing a claim with parallel end lines (or with converging end lines as in the North Star case) where the lode passes in at one end line and somewhere here (showing as on Diagram I[1]) in the middle of the claim it meets a crossing which cuts it off—the Supreme Court approved the North Star case in granting the extra-lateral right to so much of the vein as was included within the end lines of the location.

Approval of the Lakin Cases by the U. S. Supreme Court.

I am not able to say that the Supreme Court complimented my distinguished opponent in any other particular—

MR. LINDLEY. (Interrupting) It refused to issue a writ of *certiorari*.

MR. WRIGHT. I am just coming to that. The jurisdiction of the Supreme Court of the United States is limited by statute. I have in my hand here a copy of the section conferring jurisdiction in this particular class of cases. I will not read it, but simply—

MR. LINDLEY. (Interrupting) They did the same in this case as they did in the Lakin-Dolly case.

MR. WRIGHT. I beg your pardon, Mr. Lindley. Permit me to refer to the Providence case to illustrate what I mean. In the Providence case the Circuit Court rendered a decision which the Circuit Court of Appeals affirmed. A motion was made in the Supreme Court of the United States for a writ of *certiorari*. Why that writ was not granted I do not know. I think counsel himself

was very much surprised that it was not granted, because the writ is granted particularly to bring up the question of jurisdiction.

MR. LINDLEY. You are mistaken there, Mr. Wright. That is not true.

MR. WRIGHT. I know what the statute says and I say that that is the primary purpose of the writ of *certiorari*.

MR. LINDLEY. In the state courts.

MR. WRIGHT. Well, I say that it is the general rule of law, then, if counsel will have it in more general terms. The Supreme Court of the United States refused a writ of *certiorari*, and it was then supposed the Providence case was ended. Not so; for within a year counsel appealed the Providence case to the Supreme Court of the United States and there a decision was obtained, from which in a few moments I will read a few paragraphs to your Honor.

In the Lakin cases the Supreme Court—it is on the records of the Supreme Court and it is in the reports—refused both the writ of *certiorari* and *a writ of error*. Now the decisions of the Supreme Court say that the statutes on the subject of jurisdiction, and particularly the recent statutes, have been passed for the very purpose of curtailing the jurisdiction, so as to prevent the bringing of such an immense mass of material into the Supreme Court; and for that very reason that Court is very chary of issuing the writ of *certiorari*, to bring up cases that are not necessarily appealable under the statute that I have just handed to your Honor. (Sec. 6 of Chap. 517, Act of

Mar. 3, 1891, establishing Circuit Courts of Appeals.) Whether an appeal can be taken in the North Star case depends upon one thing. There was one basis for the jurisdiction and that was diverse citizenship. If there was any other basis of jurisdiction the case is appealable as of right, even after the writ of *certiorari* is refused. If an appeal has not been prosecuted by the defendant party or should not be prosecuted within the time allowed by law, then of course the case becomes *res adjudicata*. But can it be said that the Supreme Court of the United States has in any way or manner either directly or by implication made that case the law of the land? Clearly not. I asked counsel on Monday the question as to whether there was any ground of jurisdiction other than the question of citizenship and he said there was.

MR. LINDLEY. In what case was that?

MR. WRIGHT. In the North Star case. My question was asked for the very purpose of ascertaining whether there was any ground of jurisdiction except the citizenship.

MR. LINDLEY. I did not answer any such question in the affirmative, because there was not.

MR. WRIGHT. I certainly so understood you and I think the minutes will show it.

MR. LINDLEY. The record simply will show that it was a plain ordinary action in ejectment and that one party was a resident of the State of Nevada and the other a resident of the State of California.

MR. WRIGHT. Then the only way that matter could be taken up to the Supreme Court would be by a writ of

certiorari but the fact that the Supreme Court refused the writ of *certiorari* would be no proof that it approved the law of that case.

MR. LINDLEY. I did not contend that it did. I simply stated that it refused the writ of *certiorari* exactly upon the same ground that it placed its decision in the Dolly case, which was a proceeding just like it.

MR. WRIGHT. Was the order the same?

MR. LINDLEY. The order was the same except that in the Lakin v. Dolly case the petition was for a writ of error and of *certiorari*, and the Supreme Court denied them both because a writ of error in the first place did not lie in any possible light.

MR. WRIGHT. When it refused the writ of *certiorari* in the Lakin-Dolly case, a writ of error would lie and the Supreme Court refused that for the simple reason that if it brought up the case on a writ of error it would have been compelled to immediately dismiss the writ because of its approval of the doctrines of the case.

MR. LINDLEY. A writ of error never lies, if you permit me to make a statement to correct your statement of yesterday, because it was so erroneous.

MR. WRIGHT. Well, it is on the record and I am willing to stand on it.

MR. LINDLEY. Well, I simply want to straighten out both ourselves on this proposition. No writ of error lies out of the Circuit Court of Appeals to the Supreme Court of the United States in a case where the jurisdiction is acquired by reason of the diversity of citizenship.

MR. WRIGHT. I have stated that.

MR. LINDLEY. You stated that in the Lakin-Dolly case a writ of error went to the Supreme Court of the United States and for that reason they had jurisdiction to pass upon the decision of the Circuit Court of Appeals, and that is not so.

MR. WRIGHT. I say so now. I say the decision of the Supreme Court of the United States is that it refused a writ of error in that case. Now the language of the statute is as follows: Let us see what is right and what is wrong. (Reading from Sec. 6, Chap. 517, Act of March 3, 1891, establishing Circuit Courts of Appeals)

"In all cases not hereinbefore in this section made "final there shall be of right an appeal or writ of error "or review of the case by the Supreme Court of the "United States where the matter in controversy shall "exceed $1,000 besides costs."

And so in the case of Lakin v. Dolly, it was a matter of right, and counsel is not in a position to dispute the fact; and I say that the refusal of a writ of error has made that case the law of the land, and I challenge your Honor's investigation on that point.

Now I have just this morning looked up the date of the decision of the North Star case by the Circuit Court of Appeals, and I find it was rendered on the 18th day of October, 1897, consequently, unless an appeal or writ of error has been prosecuted, the case from any point of view is now *res adjudicata*. But that does not make it the decision of the Supreme Court of the United States.

Converging End Lines.

I am not going to advance any further opinion on the subject of the end line decision in the North Star case. I say, however, that the statute regarding parallelism of end lines is mandatory. I say that that doctrine permeates the Del Monte case through and through and I say that converging end lines are not parallel end lines. I do not suppose there is anybody here that will have the hardihood to dispute that, and if the rule is mandatory, it applies there. But this is not the first time I have admitted, and probably it will not be the last, that where the end lines converge in the direction of the dip of the lode, the reason for the rule ceases and therefore the North Star decision may be right, and may finally be upheld by the Supreme Court of the United States.

MR. LINDLEY. In the North Star case the end lines were converging.

MR. WRIGHT. Yes, they converged in the direction of the dip of the lode, therefore in going down into the ground the miner would not get more than he had at the surface.

Now the actual decision in the North Star case was that—if your Honor will follow the motion of my hands—(illustrating as shown on Diagram I[1]) in the middle of the claim the lode was stopped by a crossing and at that point a line was drawn parallel to the end line through which the lode passed. The owner was allowed by the decision to continue on down until he got to the other end line, which was converging, and that is exactly the

doctrine advocated by me in the Wyoming case.

MR. LINDLEY. The doctrine was conceded by both parties in the Wyoming case.

MR. WRIGHT. Well, then, the Court gave me more than I asked for in the Wyoming case, as to the Ural.

The Providence Case in the Supreme Court.

I would like to have from you (turning to Mr. Lindley) your Providence map, if it is convenient.

(Counsel produces map, similar to Diagram 8).

Now just a few comments on the Walrath v. Champion case, 171 U. S.—which is the last of these great cases decided by the Supreme Court of the United States. The gist of this matter was stated to your Honor by Judge Lindley. The end lines are here. Here is one, and here is the other (showing lines a—p and g—h). The matter in dispute was that portion of the contact lode that underlies this triangle g^1—g—h^2. This part of the claim was out here (showing h—i—k—h^1). And the question was, what extra-lateral rights attach to this segment of the contact lode (showing) found within the lines of the claim. This was a patent under the Act of 1866, a patent granted before the act of May 10, 1872, was passed, and it is therefore an extreme case. We contend it could not be governed by the same principles as the case at bar.

The Intent of the Acts of 1866 and 1872 the Same as to End Lines and Side Lines.

After citing the facts of the case, the Court, speaking by Mr. Justice McKenna, quotes with approval the main

provisions of the Flagstaff case. I shall not read all the Court quotes because I have already read it to this Court myself. The Court say: (reading from the Providence case)

"Commenting on the instructions, Mr. Justice Bradley, "speaking for the Court, said:

"'These instructions and refusals to instruct indicate "'the general position taken by the court below, namely, "'that a mining claim secures only so much of a lode or "'vein as it covers along the course of the apex of the "'vein on or near the surface, no matter how far the loca-"'tion may extend in another direction.'

"And after stating that the Act of 1872 was more ex-"plicit than that of 1866, BUT THE INTENT OF BOTH "UNDOUBTEDLY THE SAME AS IT RESPECTS "LINES AND SIDE LINES, AND THE RIGHT TO "FOLLOW THE DIP OUTSIDE OF THE LATTER, "he proceeded as follows:"

Now your Honor will perceive that the Supreme Court here takes it for granted that the meaning of the two statutes is the same as to end lines and side lines and the right to follow the lode outside of the side lines.

Then follows the quotation from the Flagstaff decision that I have already read to your Honor, and after that the following, which we consider very significant and important:

"This law was followed and applied in Argentine Min-"ing Company v. Terrible Mining Co., 112 U. S. 478; and "in Iron Silver Mining Company v. Elgin Min. & S. Co. "118 U. S. 222. *The locations passed upon in these cases were "made under the Act of 1872, but we have seen that the intent "of that Act and the Act of 1866, 'as it respects end lines and "side lines,' was the same.*"

Now, if your Honor please, it is singular that counsel can come into this presence and advance his position in the case at bar, knowing, as he must, that what I have read is the final adjudication of the Court of last resort on these points. I repeat:

"THE LOCATIONS PASSED UPON IN THESE "CASES WERE MADE UNDER THE ACT OF 1872. "BUT WE HAVE SEEN THAT THE INTENT OF "THAT ACT AND THE ACT OF 1866, 'AS IT RE- "'SPECTS END LINES AND SIDE LINES,' WAS "THE SAME."

I read further:

"But appellant urges that 'those cases are not in point "'here.' We think that they are. The patent in the Flag- "staff case appears to have been the same as here, and "besides, WHATEVER THE PATENT HERE, IT "MUST BE CONFINED TO THE RIGHTS GIVEN BY "THE STATUTE WHICH AUTHORIZES IT.

"In the Flagstaff case the lode was claimed, and hence "the right to follow it beyond the surface boundaries of "the location was claimed. Here the lode is claimed and "the right to follow it outside of the surface boundaries, "that is, beyond the line f—g, to the point x^1."

(Query: X^1 or Z^1 ? J. M. W.)

That is to say, the Providence people claimed the right to follow this lode (showing) outside of this line (showing line g—h on map), outside of the end line planes.

MR. LINDLEY. Outside of the original end lines.

MR. WRIGHT. (Continues reading) "In that case "the right contended for was denied on the principle "applicable to end and side lines. In this case, the right "contended for must be denied by the application of the "same principle."

I think there can be no question that the Supreme Court in this case, which is the first time lately it has had a chance to say a word about patents under the law of 1866, intends to make it clear that it holds to the ruling that as to extra-lateral rights, the rule is the same under both statutes. It says so. It must mean it.

MR. LINDLEY. May I ask you a question? Doesn't Judge McKenna, at the end of that very proposition, reserve the decision on the proposition of end lines under the Act of 1866?

MR. WRIGHT. Well, I will read that in a moment. I can not read all this case in a second.

MR. MCGEE. It seems you forgot to read the last part of it.

MR. WRIGHT. I have forgotten nothing, and I have refused to read nothing, and I have neglected to read nothing; and I may say, that if there is a suggestion on the part of either of the counsel that there is any lack of candor in my discussion, the suggestion comes from the character of his own mind and not from any conduct of mine in this presence.

I will not read this entire Providence case, because of course your Honor will read it all.

Reserved and Indicated Opinions of the Supreme Court.

This decision is divided into two parts, and in the last portion there is a discussion as to the ownership of the lode underneath this segment of ground, which I am now indicating by pointing (showing figure h—i—k—h^1 on

map). In other words, it is a segment of ground lying outside the line which the Court has determined to be the end line, but this little segment is a part of the surface ground granted under the patent.

MR. LINDLEY. That is simply that small part up there.

MR. WRIGHT. Yes, outside of this line (showing line g—h—h^1—h^2 on map) which is the end line. The Court says:

"The right to that portion of the contact ledge within "the boundaries of the parallelogram h—i—k—h^1 pre- "sents an interesting question. It does not appear to "have been submitted to either of the lower courts, but "the right by the decree of the Circuit Court is given to "appellee by adjudging to it that portion of the vein on "its dip which lies north-easterly of the line g—h and its "continuation.

"The question is a new one in this Court, but we think "it is determined by the principles hereinbefore laid "down. It may be true that under the Act of 1866 the "patenting of the Providence mine in its irregular shape "was in all respects legal and proper, and that the act "did not require the location to be made in the form of "a parallelogram or in any particular form, and that "there was no requirement that the end lines should be "parallel. It is also true that under that act only one "vein could be included in a location, no matter how "much surface ground was included in the patent, but "that under the act of 1872 possession and enjoyment of "all the surface included within the lines of their loca- "tion and of all veins, lodes, and ledges throughout the "entire depth, the top or apex of which lies inside of such "surface lines extended downward vertically, were given.

"But rights on the strike and on the dip of the original "vein and rights on the strike and on the dip of the other "veins, we have decided, are determined by the end lines

"of the location. In other words, it is the end lines alone, "not they and some other lines, which define the extra- "lateral right, and they must be straight lines, not "broken or curved ones. The appellant, under his "contention, would get the right such lines would give "him and something more besides outside of them. To "specialize, he would get all within a plane drawn "through the line g—h, and all within the planes drawn "through the sides of the parallelogram h—i—k—h^1.

"It may be that the end lines need not be parallel "under the act of 1866; may converge or diverge, and "may even do so as to new veins, of which, however, we "express no opinion, but they must be straight—no other "define planes which can be continuous in their own di- "rection within the meaning of the statute. It may be "that there was liberty of surface form under that act, "but the law strictly confined the right on the vein below "the surface. There is liberty of surface form under the "act of 1872. It was exercised in Iron Silver Mining Co. "v. Elgin Mining & S. Co., *supra*, in the form of a horse- "shoe; in Montana Co. Limited v. Clark, 42 Fed. Rep. 626, "in the form of an isosceles triangle."

Now, if the Court please, if there is any comfort for the gentlemen in this, they are welcome to it. The very last expression is parallelism. The statute said 200 feet—no more than two hundred feet to each locator. Is this high Court going to say that they might have more and thereby nullify the statute? Judge Field said that the most important provision of the old rules was that there should be no increase as you go down into the earth, and the Supreme Court here says, "The law strictly confined the "right on the vein below the surface."

Irregularity of Surface Form Permitted by Both Statutes.

I desire to call your Honor's most earnest attention to this subject of form, and I shall repeat again what the Court says here:

"IT MAY BE THAT THERE WAS LIBERTY OF "SURFACE FORM UNDER THAT ACT" (THE ACT OF 1866) "BUT THE LAW STRICTLY CONFINED "THE RIGHT ON THE VEIN BELOW THE SUR- "FACE. THERE IS LIBERTY OF SURFACE FORM "UNDER THE ACT OF 1872."

If your Honor please, there is no question that this language is placed here, in the very last paragraph of the very last decision, for the purpose, if you please, of preventing the *obiter dictum* in the Elgin case from doing any more harm than it has already done, by misleading counsel in a few instances, and the Courts in still fewer instances, into the belief that because a location was made prior to May 10, 1872, all jurisdiction of the Land Department was taken away, and that a party might take not only what the law gave him but what he chose to ask for. That is the claim, not merely what the law gave him, but what he chose to ask for; and the Court says that "*it may be*" that *these surface locations* were all right *so far as the surface goes;* but it clearly means to give out the warning that just as the two statutes are alike in respect of permitting surface locations to be made in irregular shape, it has also determined that as to end lines and side lines, the law under both statutes is the same.

(At this point, a recess was taken in this case until 2 o'clock this afternoon, when Mr. Wright resumed his argument as follows):

The Important Mining Decisions.

There is one feature of the Providence case that I have neglected to call to the attention of the Court. It is the same, however, that was called to the Court's attention this morning in the Del Monte case; that is to say, the Court in recapitulating for the second time the important mining cases, the cases that make the law, for some reason—a reason I think I have already explained—does not mention the Eureka case as one of the controlling cases.

Your Honor is aware of the fact that formerly, before these matters came to be better understood, the Eureka case was almost always mentioned. Especially has it been numerously cited upon the broad lode question, but for the second time the Supreme Court, for reasons of its own, has neglected to mention the Eureka case as one of the great cases showing what the mining law is to-day.

A Party Failing to Secure the Extra-Lateral Right Must Blame Himself.

In closing the remarks I wish to make upon this particular question, I will ask the indulgence of the Court while I read a few thoughts from different decisions that bear, as I think, on this subject. This will be a very brief reading and I shall not, to any considerable extent, analyze these decisions. I wish to read first a few of the re-

marks of Judge Hallett in the Court below in his decision of the Elgin case. Some of his remarks are extremely pertinent here.

In Elgin Mg. & S. Co. v. Iron Silver Mg. Co., 14 Fed. 377, after stating the case and after describing the Stone, or "horse-shoe," claim, Judge Hallett says:

"And so it appears that eastward and southward from "the northwestern end of the claim, there is no line "which can be recognized as an end line, and the claim "has but one end line, or perhaps none whatever.

"This view was not controverted at the hearing but it "was said that: 'End lines may be a matter of legal in-"'ference and deduction from established facts to control "'even the act of the locator of the claim. As the law "'requires that a location shall be made along the course "'or strike of a vein at the surface of the earth, the end "'lines must of necessity be at right angles to the course. "'And whenever the course or strike can be ascertained "'at the point where it passes from the location, end lines "'should be fixed at right angles thereto, without ref-"'erence to the end lines laid in the location.'

"To apply this rule to defendant's claim, lines should "be drawn parallel to each other at each end, and where "the out-crop of the vein is said to pass out of the loca-"tion, and in the general direction east and west, the "strike of the vein being north and south."

Your Honor will notice that this discussion was carried right along from the time of the Eureka case up to the time of the discussion in the Elgin case.

"The circular form of outcrop is thought to be the "result of erosion in California Gulch, which comes down "through the middle of the claim, and at some remote "time the outcrop may have extended directly across the

"gulch between the ends of the claim, so as to admit of "a location in the usual form with end lines, as now pro- "posed to be laid, in the general direction east and west. "It is contended that in the location of a claim, "which must of necessity be made before the "strike of the lode can be ascertained, it is too "much to expect the locator to lay his end lines in the "proper direction, and locations made at various angles "of divergence from the strike of the lode are cited to "illustrate the fact that by a slight deviation from the "proper course the object of making the location may be "defeated. This, however, is only to say that it is diffi- "cult to make a good location of a mining claim when the "situation of the ore is unknown, and that if the locator "fails to lay his claim so as to secure the ore, the law "should correct his mistake. Plainly enough, the law re- "quires the locator to fix the boundaries of the claim, of- "fering the bounty of the government to the extent of the "public domain from which to make the best possible se- "lection. If the locator fails to choose wisely and well, the "failure is with him, and it cannot be imputed to the law. "*There is no greater reason for saying that the end lines* "*shall be established by inference and presumption from* "*the course of the lode, than that the side lines shall be* "*so established.* The rule of the early miners' law, which "obtained in some mining districts before the statute was "enacted, was of the character which we are now asked "to adopt. By locating on the vein the miner secured "the number of feet allowed him, wherever it might "extend, with surface ground adjacent, and, of course, "the boundaries of the claim could only be known from "the course of the lode. By the Act of Congress that rule "was changed, and it was required that the boundaries "of the claim shall be marked on the ground, and end "lines and side lines are referred to in a way to show that "they must be laid down with care. Under such a stat- "ute it cannot be necessary to discuss at length the "power of the Court to establish lines by construction, "for no such power can exist. The end lines established

"by the locator must control, and if absent, or if so "placed as not to define the right of the locator to the "exterior parts of the lode, the defect cannot be "supplied.

"In that case the location may be valid for all that can "be found within the surface lines, but beyond those "lines an essential element of the right to follow the lode "is wanting, and therefore the right cannot exist. With "some information as to the situation of the ore, and the "law relating to the subject, the end lines of the Stone "claim could have been laid as it is now said they should "be placed, and the failure to do so was owing to ignor- "ance of facts necessary to intelligent action. *It presents "the common case of failure to obtain property through "a mistake of fact or law, for which the party seeking "the property is alone responsible. Against such error and "misfortune the law does not relieve.*"

Now we simply claim that it is the misfortune of these people in the case at bar, that they did not, after the passage of the act of 1872, come into the Land Office and so comply with the provisions of the statute as to get the extra-lateral right.

In the case of McCormick v. Varnes, 2 Utah 355, 9 M. R. 505, it is said:

"Unfortunately for the Appellant, the locators of the "Flagstaff mining claim mistook the direction of the vein "and made their location across it instead of along its "general course or strike. The Court can grant no relief "from the consequences of this mistake. *No vein is guar- "anteed by the government to those who shall apply for "a patent*, but simply promises a patent to such as go upon "and explore the public domain, and having made such "exploration, represent to the government what they "claim to have discovered and where it is located.

"*The miner is left free to make his choice of location as he "sees fit, and ample opportunity is given him to determine the*

"*situation of his lode or vein. If he makes this choice with-*
"*out sufficient exploration to guide him in making the location,*
"*the blame rests upon himself.*"

I will also quote a few remarks from the case of Watervale v. Leach, 33 Pac. 421:

"Of course, Congress expected that the miner would "avail himself of *the privilege* accorded him and locate "along the course of the lode, *but it does not require him to* "*do so.*"

The Patented Lines Control.

There is an important remark in the North Star case by Judge Beatty, who, as I have stated to your Honor, is an earnest advocate of the old doctrine that the law should be so that the end lines might be drawn through the end points of the location. He says in Carson City v. North Star, 73 Fed. 597:

"In this objection are involved the questions of the "parallelism, and of the intersection by the ledge, of the "end lines of the original locations. When those loca-"tions were made, there was no law requiring such paral-"lelism, but, independent of all lines, the right to follow "the ledge along its course for the full distance claimed, "and underground upon its true dip to any depth, was "undisputed. Although section 9 of the Act of 1872, in "repealing certain parts of the old law, provided that "'such repeal shall not affect existing rights,' *the courts* "*have held that, when any claim is patented, those rights are* "*controlled by the patented lines.*"

The Statutes Merely Definitive.

I also quote from the case of Broder v. Natoma Water and Mining Co., 101 U. S. 274:

"We are of opinion that it is the established doctrine "of this Court that rights of miners, who had "taken possession of mines and worked and devel- "oped them, and the rights of persons who had "constructed canals and ditches to be used in "mining operations and for purposes of agri- "cultural irrigation, in the region where such artificial "use of the water was an absolute necessity, are rights "which the government had, by its conduct, recognized "and encouraged and was bound to protect before the "passage of the act of 1866, and that the section of the "act which we have quoted was rather a voluntary *recog-* "*nition of a pre-existing right of possession*, constituting a "valid claim to its continued use, than the establishment "of a new one. This subject has so recently received our "attention, and the grounds on which this construction "rests are so well set forth in the following cases, that "they will be relied on without further argument: Atch- "ison v. Peterson, 20 Wall. 507; Basey v. Gallagher, 20 "Wall. 670; Forbes v. Gracey, 94 U. S. 762; Jennison v. "Kirk, 101 U. S. 240."

Your Honor will notice here that this is simply a repetition of the rule that the act of 1866 merely confirmed the rights of miners, and the act of 1872 merely followed up the act of 1866 in making it more definite.

The Principles Decided by the Providence Case.

I have prepared a recapitulation of what is decided in the Providence case, and at the risk of repetition I will go over a few words of what I have already read from that case.

After quoting voluminously from Flagstaff v. Tarbet, 98 U. S. 463, as showing "the extent of the right passing "under the act of 1866," the Court says:

"This law was followed and applied in Argentine Min-
"ing Company v. Terrible Mining Company, 122
"U. S. 478; and in Iron Silver Mining Company
"v. Elgin Min. & S. Co., 118 U. S. 196; King v.
"Amy and Silversmith Consol. Min. Co., 152 U. S. 222.
"The locations passed upon in these cases were made
"under the Act of 1872, BUT WE HAVE SEEN THAT
"THE INTENT OF THAT ACT AND THE ACT OF
"1866, 'AS IT RESPECTS END LINES AND SIDE
"'LINES' WAS THE SAME.

"But appellant urges that 'those cases are not in point
"'here.' We think that they are. The patent in the Flag-
"staff case appears to have been the same as here, and be-
"sides, whatever the patent here, it must be confined to the
"rights given by the statute which authorizes it. In the
"Flagstaff case the lode was claimed, and hence the
"right to follow it beyond the surface boundaries of the
"location was claimed. Here the lode is claimed and the
"right to follow it outside of the surface boundaries, that
"is, beyond the line f—g to the point X^1. In that case,
"the right contended for was denied on the principle ap-
"plicable to end and side lines. In this case, the right
"contended for must be denied by the application of the
"same principle."

Here is an explicit ruling that the principles applicable to the end lines of locations made under the law of 1866 are the same as those applicable to the end lines of locations made under the law of 1872. But, as if fearing the above might be misunderstood, the Court in the last paragraph of the decision, says:

"It may be that the end lines need not be parallel
"under the act of 1866; may converge or diverge, and
"may even do so as to new veins, of which, however, we
"express no opinion, but they must be straight—no other
"define planes which can be continuous in their own

"direction within the meaning of the statute. It may be "that there was liberty of surface form under that act, "but the law strictly confined the right on the vein below "the surface. There is liberty of surface form under the "Act of 1872. It was exercised in Iron Silver Mining Co. "v. Elgin Mining & S. Co. *supra*, in the form of a horse-"shoe; in Montana Co. Limited v. Clark, 42 Fed. Rep. 626, "in the form of an isosceles triangle."

Here four propositions are made clear. (1) The liberty of surface form allowable in locations made under the law of 1866 had no other or greater significance than that under the law of 1872; (2) "The law "strictly confined the right on the vein below "the surface" under the law of 1866 as well as under the law of 1872. And this is tantamount to Judge Field's assertion in the Eureka case, 4 Sawy. 322, that "no construction is permissible which would sub-"stantially defeat the limitation of quantity on a ledge, "which was the most important provision in the whole "system of rules." (3) The lines bounding extra-lateral rights must be straight in all cases, whether of locations under the law of 1866 or of 1872. (4) Under both statutes the mining right is bounded by straight parallel end lines.

This fourth proposition may be modified in this form: Under both statutes the mining right is bounded by straight parallel end lines or by straight converging end lines.

MR. LINDLEY. Is that your language, Mr. Wright?

MR. WRIGHT. Yes, that is my language and the Court so understands it. These principles necessarily follow

from the provisions of the two statutes. The law of 1872 says, "the end lines of each claim shall be parallel to "each other." The law of 1866 says, "no location here-"after made shall exceed 200 feet in length along the "vein for each locator, * * * with the right to fol-"low *such* vein to any depth." The one provision is equally mandatory with the other.

Now, I say without fear of successful contradiction, that under these laws, under each of these laws, the end lines must, in the first place, be straight; secondly, under the provisions of each statute, either they must be parallel or they must converge, because each statute is mandatory in saying the locations made under it may equal but shall not exceed a certain amount on the lode.

The Effect of Diverging End Lines. Mr. Lindley's Illustration.

It is to me, your Honor, indeed singular that I must contend for the principle of parallelism of end lines, not with, but against the counsel who opened this argument. I have read with the greatest admiration his arguments in the Circuit Court and the Supreme Court, respectively, in the Providence case. No man has presented a more powerful argument, than has the distinguished counsel, against the divergence of end lines in the direction of the dip of the lode, and I do not fear that I shall weary the Court by repeating his language.

MR. LINDLEY. Under the Act of 1872.

MR. WRIGHT. Well, we will see how it comes out.

Diagram D^1.

MR. LINDLEY. Before the Supreme Court of the United States, it was conceded by both counsel that under the Act of 1866 divergence of end lines was possible; I think the brief of both sides will show that.

MR. WRIGHT. Well, I don't know what was conceded verbally in the Supreme Court excepting as the counsel states it.

MR. LINDLEY. It is on the record.

MR. WRIGHT. But *in the record made by counsel* is a most powerful argument and I would like to use it here. I am sure counsel cannot object to my presenting *his own view*, when I read *from his own brief*, on page 22 of the brief filed by Mr. Lindley in the Supreme Court of the United States in opposition to the issuance of a writ of *certiorari* in the case of Walrath v. Champion Mining Company. (Reads from the brief and illustrates from Diagram D[1].)

"In figure 6 (see next page) we have the Providence "location A with the contact ledge X^1—X^2 crossing the "line f—e at an assumed point X, and extending on its "course through an assumed location D.

"There was some evidence introduced at the trial tend- "ing to show that the ledge passes out of the line f—e "approximately at the point X. But we are now dealing "with this as an hypothesis.

"The location 'D' is under the Act of 1872, and, of "course, junior in point of time to 'A.' D is a regular "valid location, covering fifteen hundred feet of the apex "of the ledge X—X^1—X^2. The end lines are parallel to "each other and crosswise of the lode.

"If the petitioner's theory is correct, that his northerly "bounding plane is to be drawn through f—g—g^1, it fol-

" lows as a corollary that the same rule is to be applied to " the crossing on the line f—e at X. He will, therefore, " have all the segment of the contact ledge lying between " vertical planes drawn through the lines f—g—g^1 and " f—e—k—e^1, and those lines produced indefinitely.

" Say the length of the ledge X—X^1—X^2 within the " surface lines of his location f—g and f—e is 700 feet, " the dip being in the direction of the arrows. Petitioner " follows the ledge on its downward course between ver- " tical planes drawn as above stated.

" When he reaches 2,000 feet in depth on the downward " course of the vein, he has *five thousand linear* feet of the " ledge between the points g^1 and e^1 with a surface *apex* " of only 700 feet. 'D' who has a regular valid location, " with 1,500 feet of the apex, could on plaintiff's theory " take nothing below the plane drawn through e—k—e^1.

" Can petitioner seriously contend that Congress in- " tended to grant him any such extraordinary rights?"

Application of the Lindley Illustration.

Now, I will make myself responsible for the following language. I have followed his conclusions——

MR. LINDLEY. (Interrupting) May I just interrupt you a moment?

MR. WRIGHT. Will you permit me to finish this and then you can make your comment.

MR. LINDLEY. I simply wish to suggest that the nature of this——

MR. WRIGHT. (Interrupting) I know the nature of it just as well as you. I am simply using this in my own way for my own purpose.

Now let *us* suppose *here*, that the figure " A " represents a location made, if you please, *under the law of*

1866. Let us suppose further, that the lode $X—X^1—X^2$ *is the only lode found within the claim*, the lode "expressed in "the patent," as the statute puts it. Now *that* is *our* supposition *here*. Now let us apply the test of this illustration to the Pioneer case. According to Mr. Lindley's present contention, and using his own language—that is to say, according to his contention in the case at bar, and using his own language—"When he" (the owner of the claim A) "reaches 2,000 feet in depth on the downward "course of the vein, he has *five thousand linear* feet of the "ledge between the points g^1 and e^1 with a surface apex "of only 700 feet."

Two thousand feet, if your Honor please, is only a moderate depth in these localities.

I quote Mr. Lindley again when *I* ask *him*, "Can he "seriously contend that Congress intended to grant him "any such extraordinary rights?"

How can he so contend against a statute mandatory in providing that no more than a given number of feet of the ledge shall be located,—against the entire body of miners' rules in all the districts throughout the states of the Pacific Coast,—against the decision of the Circuit Court that, "NO CONSTRUCTION IS PERMISSIBLE "WHICH WOULD SUBSTANTIALLY DEFEAT THE "LIMIT OF QUANTITY ON THE LEDGE,"—and "against the decision of the Supreme Court of the United "States that "THE LAW" (OF 1866) "STRICTLY "CONFINED THE RIGHT ON THE VEIN BELOW "THE SURFACE," AND THAT THE END LINES "'MUST BE STRAIGHT'"

MR. LINDLEY. Now, may I ask you a question, Mr. Wright.

MR. WRIGHT. Yes, sir.

MR. LINDLEY. Isn't it a fact that in the Providence case the only right the Providence had to that lode was by virtue of the act of 1872?

MR. WRIGHT. Yes, sir.

MR. LINDLEY. And that the illustration of the argument is simply upon the force and effect of the act of 1872?

MR. WRIGHT. I have illustrated it and I think the Court understands the illustration. My argument is based on the hypothesis that this was *the only lode located, the only lode within these boundaries.* (To the Court) The argument certainly shows Mr. Lindley's rule in the extreme. It is a matter easy of calculation by the Court in the case at bar to determine how much would be gained by the owner of the Pioneer claim going down in depth say 2,000, 3,000, 4,000, 5,000 or 6,000 feet. That is very easy for the Court to determine. But here we have an easy illustration where we only have 700 feet on the lode. Mr. Lindley would necessarily he here contending that at the depth of 2,000 feet his client should have 5,000 feet of the lode.

MR. LINDLEY. Under the act of 1872 we would have—

MR. WRIGHT. (Interrupting) Would you have it under any act, as you contend? Under *any* act? I am drawing an exact parallel, the only difference being, if your Honor please, that in this case used for illustration,

the divergence between the end lines is greater than it is in the case of the Pioneer.

THE COURT. At what angle was it, Mr. Wright?

MR. WRIGHT. The divergence in the case of the Pioneer is 14 degrees and 45 minutes.

Review of Defendant's Objections Continued.

Now, if your Honor please, I do not care to make any further remarks upon these particular objections. It is, however, my duty to briefly recapitulate the remainder of the objections. These objections I have just discussed, were 21 and 22. Your Honor of course understands that this argument is intended to apply to the reasons enumerated in the printed record in 1408, as "a", "b", "c", "d" and "e" on pages 79 to 85.

The next objections are found on page 86, objections 23 and 24. The argument that has just been completed will necessarily be understood to apply to objections 23 and 24, it being certain, of course, that if the patent is not competent evidence to prove the *locus in quo*, then no testimony relative to the ore actually extracted could be held to apply to the patent, which is the only title that is set up by the plaintiff, and therefore this testimony would not be competent to prove anything set up in the complaint. The argument will of course apply to the reasons given or enumerated as reasons "a," "b," "c," "d" and "e" on pages 87 to 94.

The Complaint not Demurrable.

I desire to make a few remarks and illustrations that will apply to the complaint.

The complaint unquestionably sets up a cause of action, inasmuch as it alleges the ownership of that segment known as Lot No. 48. It undertakes also to set up the ownership of an extra-lateral right, and the allegation as to the trespass is, in effect, that the defendant has trespassed on all the property named in the complaint—that is the substance of the allegation—therefore it might be that the defendant had trespassed upon Lot No. 48 and therefore it is clear that there was a cause of action and the complaint was not demurrable. I take it that that is probably the reason—it was the only reason I could see—why the Circuit Court of the United States remanded this case to the state court. Because, if we had gone within this segment, a federal question was not necessarily involved, as it would have been no more than an ordinary trespass, a mere question as to whether we were in this ground or not. According to the complaint we might have trespassed under this ground of the plaintiff, and therefore it must be admitted that the Circuit Court was right in remanding the causes to the State Court.

I think it is proper for us to illustrate reasons "d" and "e" found on pages 83 to 85 and reasons "d" and "e" found on pages 92 to 94.

The averment in the complaint of an extra-lateral right is of 1589 $^{94}/_{100}$ linear feet of the lode throughout its en-

tire depth. This would be a complete and perfect averment of the extra-lateral right *if the end lines were parallel.* I think that in all the cases I have seen, similar language has been used, but in every other case where I have noticed this language, the end lines of the location were parallel, so that the averment covered all the lode between the end lines extended.

Diagrams Illustrating the Argument and Showing the Defects of the Complaint and the Patent.

Our answer to this complaint is that, while the end lines diverge, the allegation is of only 1589 $^{94}/_{100}$ linear feet, and therefore we say, and we insist upon the objection, that it is impossible to tell from this complaint whether the ore that has been taken out was within any segment of the lode alleged in the complaint or not. In other words, we say that no segment of the lode has been alleged.

I have here some diagrams which I desire to exhibit to the Court illustrating some of the matters discussed in my argument. This diagram (referring to Diagram A) represents a segment of 1589 $^{94}/_{100}$ feet of the lode paralleling the south end line. There is no other purpose in using this except to illustrate the lackings of the complaint.

The next is Diagram B. Your Honor will notice that it represents a segment of 1589 $^{94}/_{100}$ feet of the lode paralleling the north end line. "A" and "B" illustrate the reason "d" for objection 24 on pages 92-93.

Diagram A.

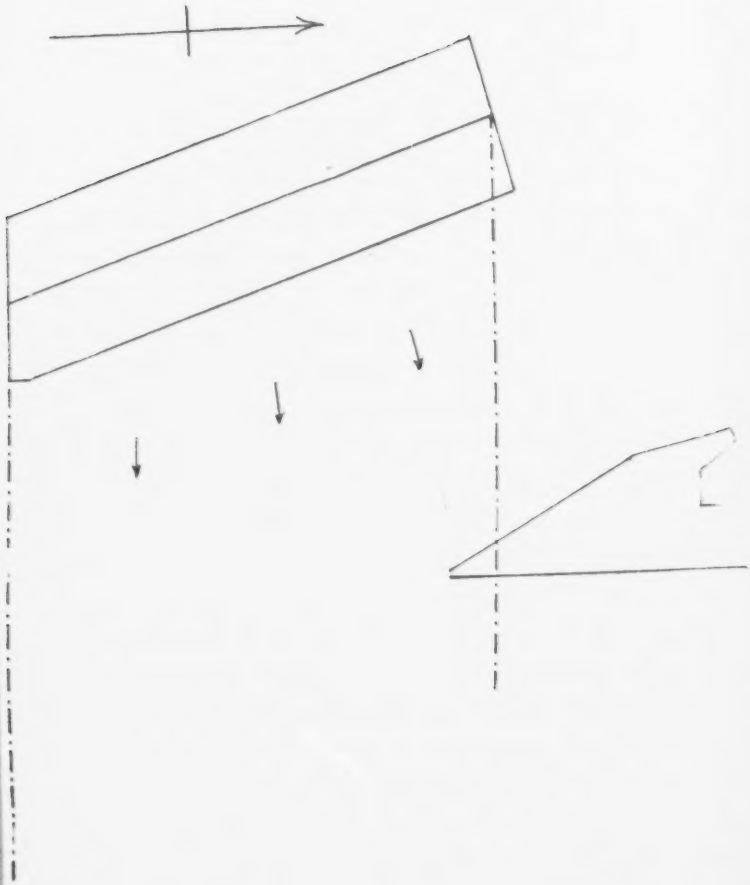


Diagram B.

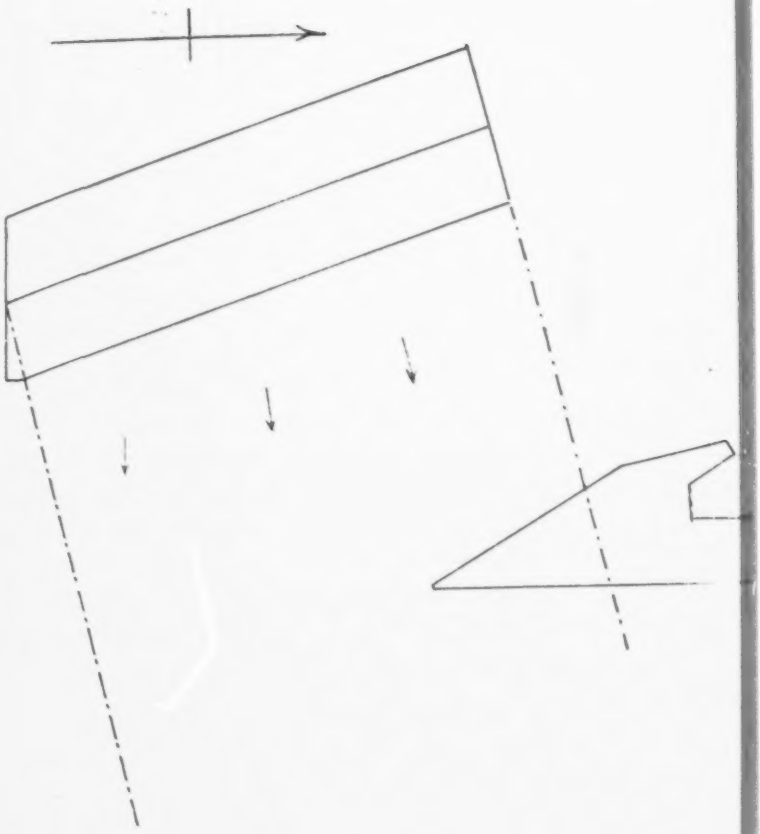
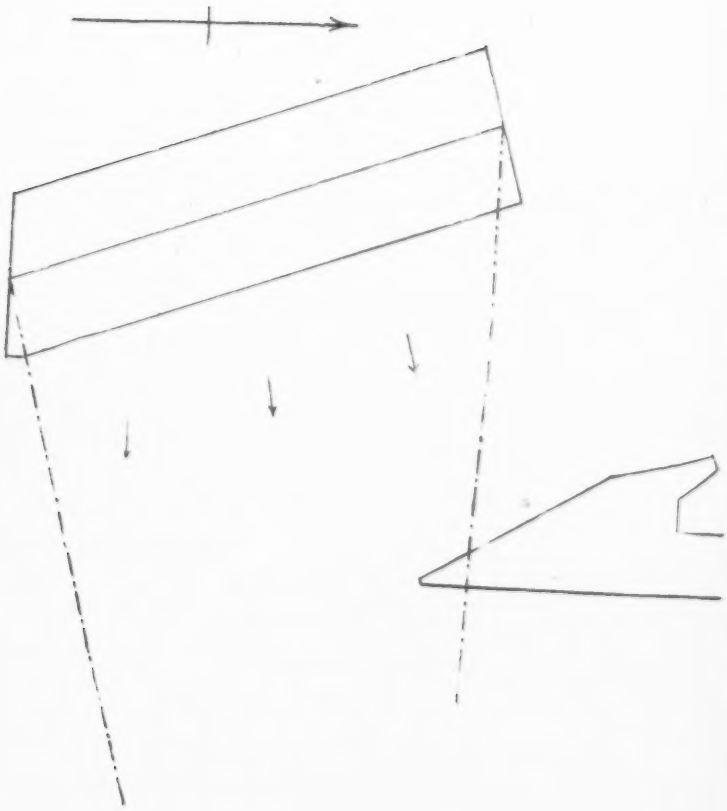


Diagram C.



Here is a plat (referring to Diagram C) showing the north end line paralleling the south end line of Lot No. 48 and the south end line paralleling the north end line. Your Honor sees these are converging. I shall have something to say a little further on about this when I present another illustration.

MR. McGEE. Mr. Wright, do you claim that the complaint does not disclose the fact that the end lines are divergent?

MR. WRIGHT. That it does not disclose that fact?

MR. McGEE. Yes.

MR. WRIGHT. I have asserted at numerous times that it does disclose it. In every way that it is possible to state it, I have stated that fact.

THE COURT. What was the question?

MR. McGEE. My question was whether he contended that the complaint in this action did not disclose that the end lines of the Pioneer claims are diverging.

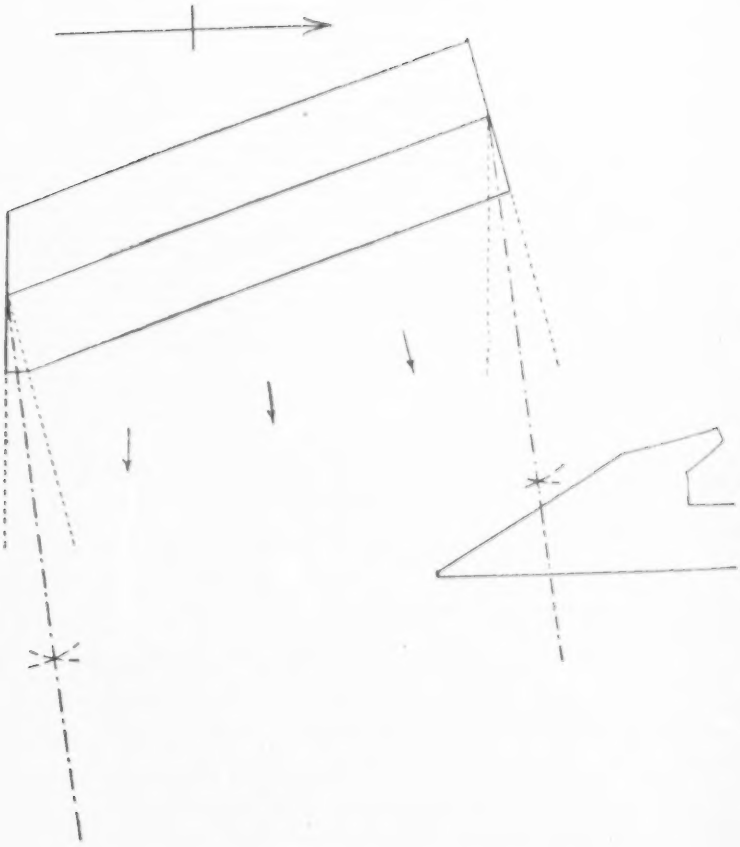
MR. LINDLEY. In other words, that those end lines embrace 1589 $^{34}/_{100}$ feet on the surface.

MR. WRIGHT. I have stated in every way that it is possible to do it that the complaint shows that the end lines are diverging.

MR. LINDLEY. You did not demur to the complaint.

MR. WRIGHT. I did not demur to the complaint for the simple reason I have stated several times in the course of my argument to the Court, that your complaint does state a cause of action, that is, you allege your ownership of that piece of ground.

Diagram D.



THE COURT. I understand you perfectly; you contend that they allege title to Lot 48.

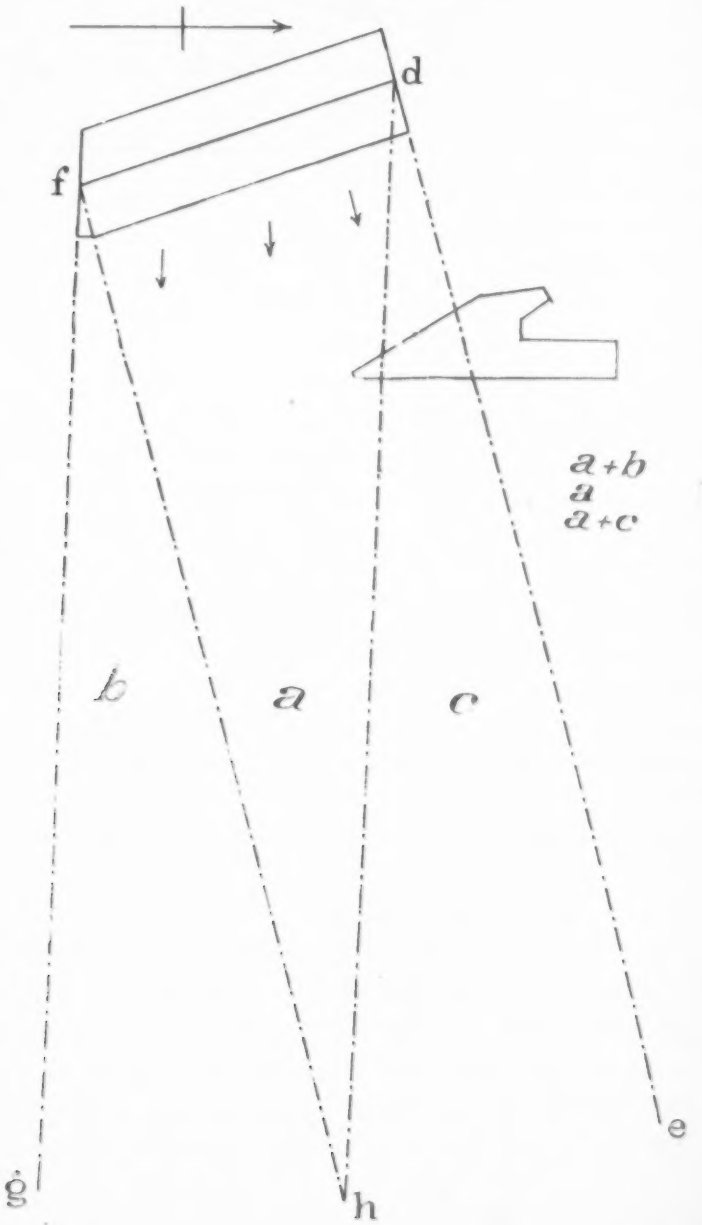
MR. WRIGHT. Yes, and they allege against the defendant a trespass on that segment and therefore they state a cause of action.

(Producing Diagram D) Here is a little plat, if your Honor please, showing a division of this extra angle of 14 degrees and 45 minutes but giving 1589 $^{94}/_{100}$ linear feet between the end lines as marked. This is merely for the purpose of illustration, to show one of the possible methods of solution. But I do not state that this is to be taken in any way as a probable solution nor do I wish to be understood except as denying their extra-lateral right entirely.

(Exhibiting Diagram C[1]) This little map I think is of some significance. Now these green lines d—e and f—g, if your Honor please, represent the end lines of Lot No. 48 extended, and this line d—h is drawn downward parallel to the south end line of Lot No. 48 extended, and the southerly red line f—h is drawn down parallel to the north end line of Lot No. 48 extended. Your Honor can see the extra angle. This is a representation of the angle of 14 degrees and 45 minutes on either side.

Now, if we undertake to define any segment of ground or to show what segment of ground can be defined by reference to these end lines, I submit that, as a geometrical proposition, the triangle "a" is the only constant one. If we parallel the south end line, we have the segments "a" and "b". If we parallel the north end line, we have

Diagram C¹.



the segments "a" and "c". Then "a" is the only constant quantity.

The objections present these diagrams to the consideration of the Court, and I submit that they show, not *how* the extra-lateral right *can* be defined but that they show it *cannot* be defined by *any language in the complaint*. Here in the triangle "a" is positively the only segment of the lode that can be defined by reference to the end lines of the Pioneer location.

(Exhibiting Diagram M)

This is elementary, if your Honor please, but it will do no harm to call attention just for a moment to an ideal location with end lines crossing the lode at right angles.

This diagram (exhibiting Diagram N) is also a perfect location, the segment of ground being no more than 600 feet wide and the end lines drawn diagonally across the lode line. This would also be a perfect location and would carry the extra-lateral right.

MR. MCGEE. What would be the extra-lateral right in Diagram N?

MR. WRIGHT. The extra-lateral right would be between these two planes (showing in direction of dotted lines on Diagram N); that is, the dip being in this direction (showing as in the direction of the arrows on Diagram N).

Some of these maps might have been more properly used in the body of my argument, but I think I may properly use them at present to illustrate the different propositions, without any further comment. I do not desire to comment on them, your Honor.

Diagram M.

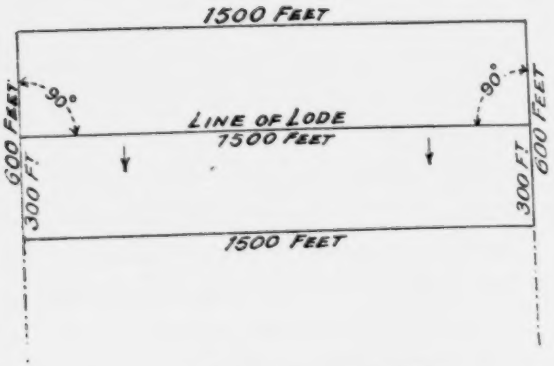
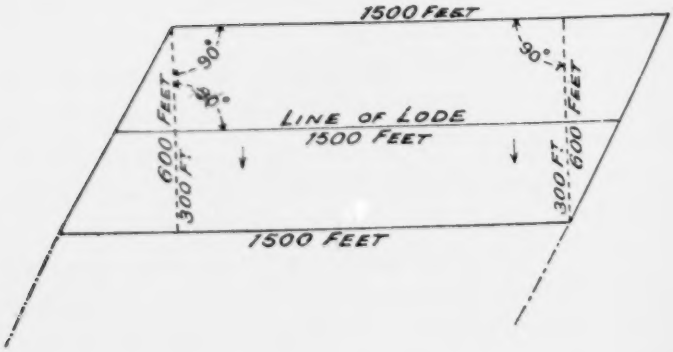


Diagram N.



Now, of course this illustration varies according to the varying application of the rule drawing the end lines at right angles to the general course of the lode. It depends of course on what the base line is that you take, what the datum line is.

(Presenting Diagram F) The diagram in this instance illustrates the end lines drawn at right angles to the south end of the Kennedy lode, the part south of the bend.

(Presenting Diagram G) In this case, the end lines are drawn at right angles to the north end of the Kennedy lode as described in the patent, the part north of the bend. It is a part of the agreed statement of facts. Your Honor will see that in this case one of the lines is exactly the same as the north end line of the Argonaut extended.

(Presenting Diagram H) In this case the datum line is drawn from the bend in the Kennedy lode to the south center of the Pioneer.

(Exhibits Diagram I) This diagram represents the end lines drawn at right angles to the general course of the lode from the north center of the Kennedy to the south center of the Pioneer.

MR. MCGEE. This is, of course, assuming the general course of the Kennedy lode.

MR. WRIGHT. No, sir, the course of the Kennedy lode as defined in the patent.

MR. LINDLEY. The lode line is defined in the patent, but the lode is not.

MR. WRIGHT. The lode is defined in the patent, begging the gentlemen's pardon.

Diagram F.

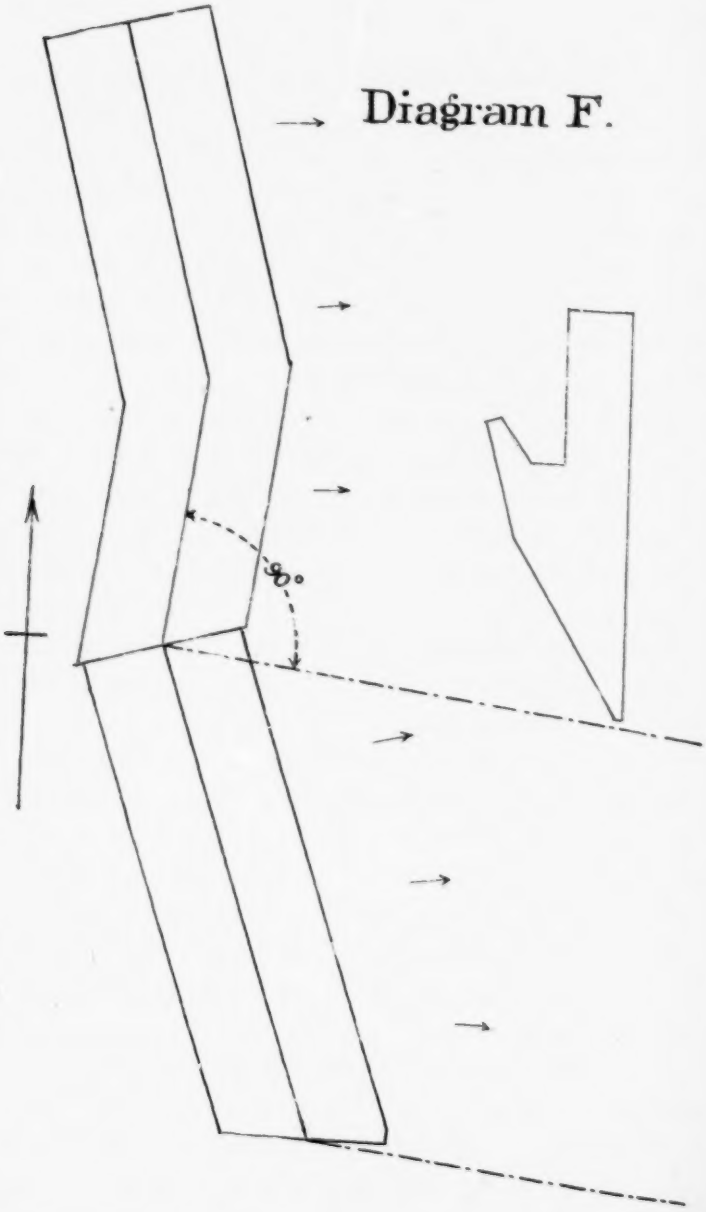


Diagram G.

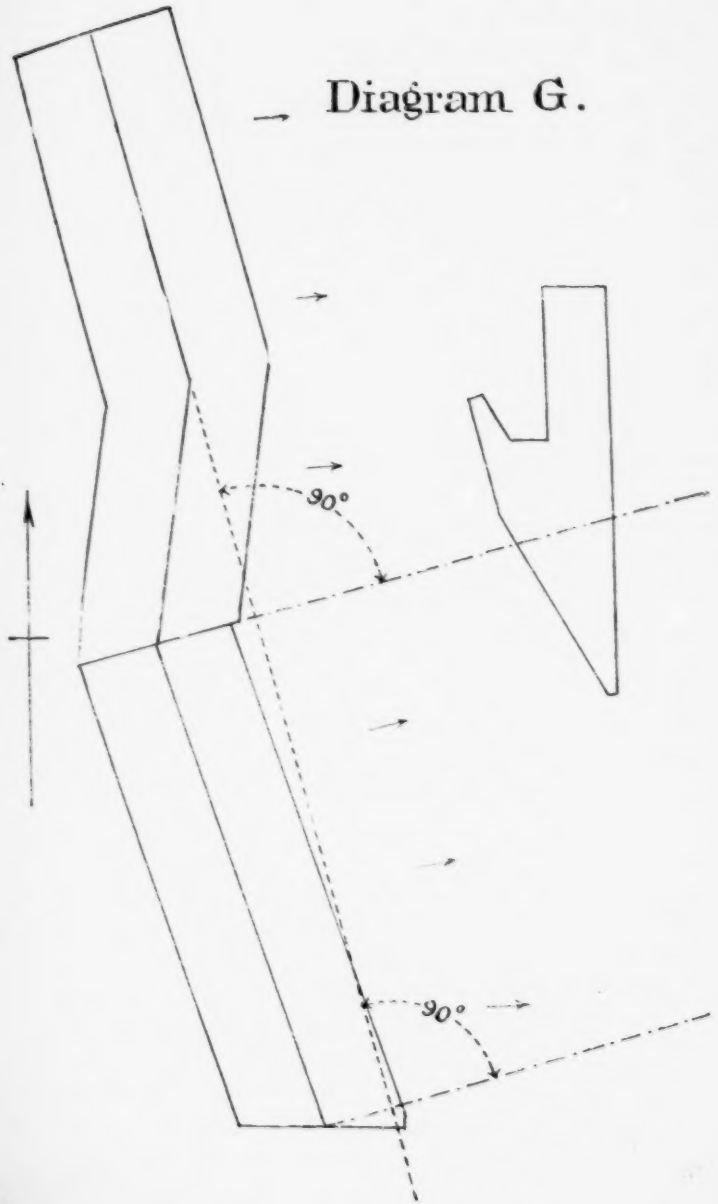


Diagram H.

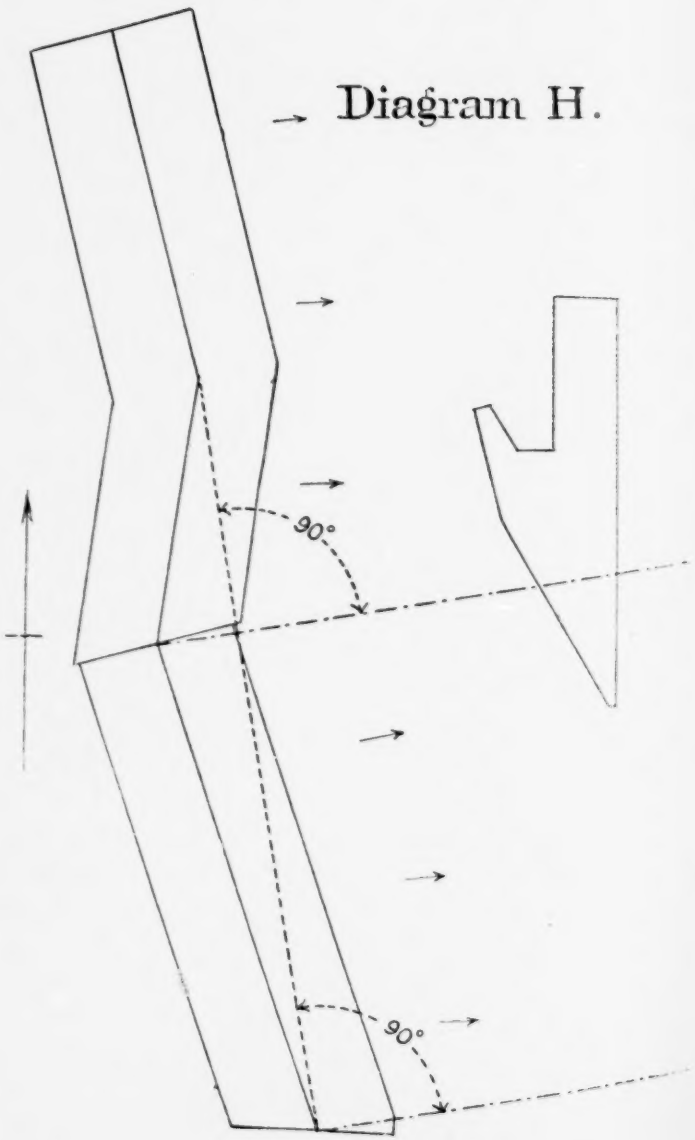
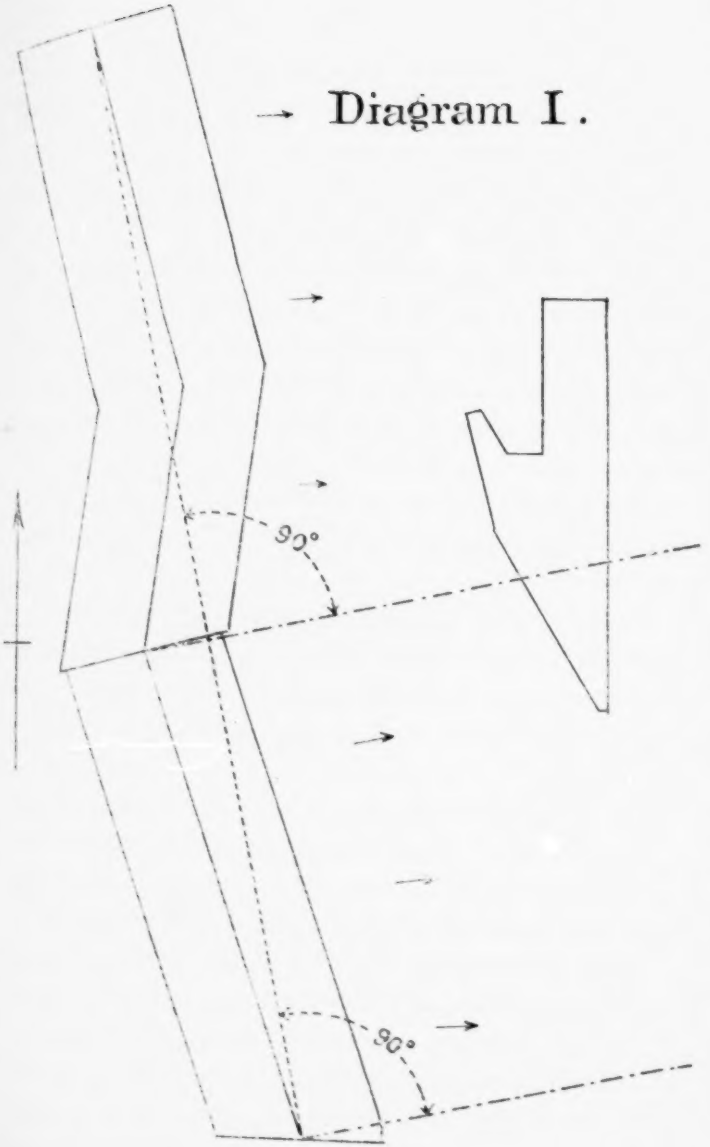


Diagram I.



MR. MCGEE. I suppose the patent will show for itself.

MR. WRIGHT. The lode, as a matter of fact, is defined in the patent.

MR. LINDLEY. Well, we had that same discussion in the Wyoming case.

MR. WRIGHT. I am not talking about the law of the case. I am talking about the facts of the case. You can start from this center (showing the bend in the Kennedy lode) and you can walk on the lode, if you choose, to this point here (showing south center of Kennedy Mine) and you can start from this point (showing the bend in the Kennedy lode) and you can trace the lode up to that end (showing the north end center of Kennedy Mine) without any difficulty.

MR. LINDLEY. But there are local elevations there.

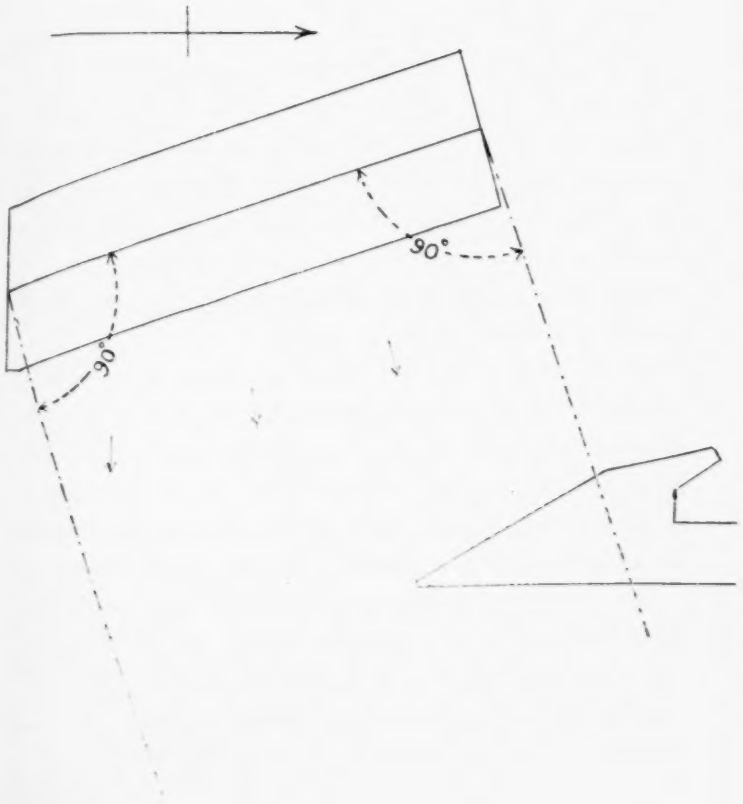
MR. WRIGHT. I know that, sir, but I have traced it. I have traced it from the one point to the other by the assistance of one of the most eminent mining engineers in this state.

MR. LINDLEY. Well, that is not a fact in this case.

MR. WRIGHT. I know, but what I say is that the lode itself is defined in the patent; the Court will examine for itself and understands the purpose of these illustrations.

If your Honor please, these are all the maps that I care to exhibit, and they are exhibited for the purpose of showing not only the difficulty but the absolute impossibility of defining an extra-lateral right by means of this patent, and they are exhibited for the further purpose of showing to a certainty, as I think, that the plaintiff's complaint

Diagram E.



has not defined any property in anything that can be identified by means of the complaint, excepting a segment of ground. These maps speak for themselves.

MR. MCGEE. What does the map "E" show, Mr. Wright; have you explained that?

MR. WRIGHT. Map "E" shows the same as the blue lines that you have on your big map. (See Diagram E.)

MR. MCGEE. The Pioneer claim with the end lines drawn at right angles to the lode?

MR. WRIGHT. Drawn at right angles to the Pioneer lode. These are a little to the north (showing on Diagram E) but if you would draw the lines at right angles to the course of the Kennedy lode and apply your rule, I think we could shake hands with you very soon.

MR. MCGEE. The compromise says that the lines should be drawn at right angles.

MR. WRIGHT. We care nothing about any compromise, and we have already shown our reasons why. The Kennedy Company does not claim the right to all that triangle (See Diagram E') though it would be awarded to us under the Eureka case—under the end line portion of the decision in the Eureka case—but we do not ask it.

Now, if your Honor please, I have talked a long time, but even if I have wearied you, I shall not apologize, for I have only acted in the line of my duty, and I hope that your Honor has listened with patience, at least.

I will now give way to my associate, Mr. Waters.

APPENDIX.

TRANSCRIPT OF RECORD IN NO. 1408.

IN THE

SUPERIOR COURT OF THE COUNTY OF CALAVERAS

AND

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY

VS.

KENNEDY MINING AND MILLING COMPANY.

No. 1408.

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(6)	"Exhibit A" (Map) between	62–63

1. COMPLAINT.

IN THE

Superior Court of Amador County,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY (A CORPORATION), *Plaintiff*,

VS.

KENNEDY MINING AND MILLING COMPANY (A CORPORATION), *Defendant*.

Complaint.

Plaintiff complains of defendant and alleges:

I.

That at all times mentioned in this complaint the plaintiff Argonaut Mining Company was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

II.

That at all times mentioned in this complaint the defendant Kennedy Mining and Milling Company was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

III.

That at all times mentioned in this complaint the plaintiff has been and now is the owner and in the possession and entitled to the sole and exclusive possession of all that certain mine and mining claim situate, lying and being in Jackson Mining District, Amador County, State of California, designated by the Surveyor-General of the State of California as Lot No. Forty Eight (48), embracing a portion of the North East Quarter of Section Twenty (20) in Township Six (6) North of Range Eleven (11) East Mt. Diablo Meridian, which said mine and mining claim was and is commonly known as and called the Pioneer Quartz Mine, and is more particularly described as follows, to wit:

Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty one (21) in Township Six (6) North of Range Eleven (11) East Mount Diablo Meridian bears North Eighty nine (89) degrees thirty six (36) minutes east at the distance of Twenty (20) chains and eleven (11) links; thence from said post marked 46 South eighty nine (89) degrees thirty six (36) minutes west, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode, seven (7) chains and eighty (80) links to post marked 46; thence North nineteen (19) degrees fourteen (14) minutes west, twenty three (23) chains and seven (7) links to post marked 46, at the north west corner of the claim from which post marked 37 situate at the south west corner of the Kennedy Company's claim upon the Kennedy Mine

bears South seventy four (74) degrees fifty one (51) minutes west at the distance of thirty two (32) links; thence from said post marked 46 North seventy four (74) degrees fifty one (51) minutes East along the Southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46 the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the Southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from which a post marked 37 situate at the South East corner of the said Kennedy Company's claim bears North seventy four (74) degrees fifty one (51) minutes East at the distance of thirty two links. Thence from said post marked 46 South nineteen (19) degrees fourteen (14) minutes East four (4) chains and three (3) links to post marked 46 situate at the Southwest corner of the Mill Site belonging to said Pioneer Quartz Mine and adjoining the same on the East, twenty four (24) chains and fifty (50) links to post marked 46. Thence South fifty-seven (57) links to place of beginning.

And plaintiff avers that at all of said times it was and now is the owner, in the possession of and entitled to the exclusive possession of 1,589 94-100 linear feet of that certain quartz vein or lode known as the Pioneer Quartz vein or lode, which has its apex within the premises hereinbefore described, with the exclusive right to said 1,589 94-100 feet of said lode throughout its entire depth, although it may enter the land adjoining. And said

plaintiff at all of said times was and now is the owner of all other veins, lodes and ledges throughout their entire length and depth, the top or apices of which lie within or inside of the exterior lines of the Pioneer Quartz Mine described as aforesaid, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside of the vertical side lines of said described Pioneer Quartz Mine.

IV.

That defendant has sunk an incline shaft upon land adjacent to plaintiff's mining claim and since August 11th, 1894, and prior to the commencement of this action said defendant by means of said shaft and of levels, drifts, crosscuts and stopes, has penetrated into and upon the said lands and premises belonging to this plaintiff as hereinbefore alleged and into and upon the lodes, ledges and veins having their apices within the surface lines of said Pioneer Quartz Mine, and by means of said underground works has wilfully, wrongfully and unlawfully and without the license or consent of said plaintiff worked and mined said lodes, ledges and mining ground and has taken out and extracted therefrom and converted to its own use large quantities of gold bearing quartz of great value.

And plaintiff alleges upon its information and belief that said defendant since Aug. 11, 1894, and prior to the commencement of this action has extracted over three

thousand tons of ore and gold bearing quartz from the veins, lodes and ledges aforesaid, and has taken out, carried away and converted the same to its own use. That said ore was of great value, to-wit: Of the value of 135 Thousand Dollars. That by reason of the aforesaid acts of defendant plaintiff has been damaged in the sum of One Hundred and Thirty-Five Thousand Dollars.

V.

Plaintiff further alleges that defendant threatens to continue said wrongful acts and threatens to continue to so mine and work the veins, ledges and lodes so belonging to this plaintiff as hereinbefore set forth and to extract, remove and convert to its own use the gold bearing ore and quartz therein and will do so unless restrained by the order of this court.

WHEREFORE plaintiff prays judgment against defendant.

FIRST—For the sum of One Hundred Thirty-Five Thousand Dollars damages and for its cost of suit herein.

SECOND—That the defendant and its agents, servants and employees be enjoined from trespassing upon said plaintiff's said property or upon any portion thereof pending this action and from in any manner extracting ore or gold bearing quartz therefrom or entering in or upon the lodes or ledges of plaintiff.

THIRD—That by the final judgment of this court defendant be perpetually restrained and enjoined from trespassing upon the lands, lodes and ledges of plaintiff.

FOURTH—That plaintiff have such other, further and general relief as may be just.

LINDLEY & EICKHOFF, and
W. J. McGEE,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, }
County of Amador. } ss.

W. F. Detert, being first duly sworn, deposes and says: I am the President of the Argonaut Mining Company, the plaintiff named in the foregoing complaint. I have read said complaint and know the contents thereof. The same is true of my own knowledge except as to the matters therein stated upon information or belief and as to such matters I believe it to be true.

W. F. DETERT.

Subscribed and sworn to before me this 5th day of August, 1897.

(Notarial Seal)

THOMAS CANLON,
Notary Public,
Amador County, Cala.

[Endorsement]: No. 1408. In Superior Court, County of Amador. Argonaut Mining Company (a corporation), Plaintiff, vs. Kennedy Mining and Milling Company, Defendant. Complaint. Filed August 5, 1897. C.

L. Culbert, Clerk. Lindley & Eickhoff, Attorneys for Plaintiff, 530 California Street, San Francisco, Cal, Rooms 39, 40, 41 and 42. Filed May 6, 1898, A. L. Wyllie, Clerk.

2. ANSWER.

IN THE

Superior Court of the County of Amador,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY (A CORPORATION), *Plaintiff*,

vs.

KENNEDY MINING AND MILLING COMPANY (A CORPORATION), *Defendant*.

No. 1408.

Answer.

Now comes the above named defendant and answers the complaint filed by the above named plaintiff in the above entitled action.

Defendant admits that at all the times mentioned in the said complaint the plaintiff Argonaut Mining Company has been and that it now is the owner, and in possession and entitled to the sole and exclusive possession of all that certain mine and mining claim situate, lying and being in Jackson Mining District, Amador County, State of California, designated by the United States Surveyor General for the State of California as Lot No. Forty-eight (48) embracing a portion of the North East quarter of Section twenty (20) in Township Six (6) North of Range Eleven (11) East Mt. Diablo Meridian, which said mine and mining claim was and is called the Pioneer Quartz Mine.

And defendant admits and alleges that the particular description of said Pioneer Quartz Mine, to-wit, said Lot No. Forty-eight, and of the exterior boundaries thereof

and of the place of beginning thereof, set forth in said complaint, is true and correct, that is to say, that said Pioneer Quartz Mine, to-wit, said Lot Number 48, is particularly and correctly described as follows, to-wit, Beginning at a post marked 46 from which the quarter section corner between sections twenty (20) and twenty-one (21) in Township Six (6) North of Range Eleven (11) East Mount Diablo Meridian bears North Eighty-nine (89) degrees thirty-six (36) minutes East at the distance of twenty (20) chains and eleven (11) links; Thence from said post marked 46 South eighty-nine (89) degrees thirty-six (36) minutes West, three (3) chains and eighty (80) links to post marked 46, at southern end of the lode seven (7) chains and eighty (80) links to post marked 46; Thence North Nineteen (19) degrees fourteen (14) minutes west, twenty-three (23) chains and seven (7) links to post marked 46, at the North west corner of the claim from which post marked 37 situate at the South West corner of the Kennedy Company's claim upon the Kennedy Mine bears South seventy-four (74) degrees fifty-one (51) minutes West at the distance of thirty-two (32) links; Thence from said post marked 46 North seventy-four (74) degrees fifty-one (51) minutes East, along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46, the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim seven (7) chains and sixty (60) links to post marked 46 from

which a post marked 37 situate at the South East corner of the said Kennedy Company's claim bears North seventy-four (74) degrees fifty-one (51) minutes east at the distance of thirty two (32) links; Thence from said post marked 46 South nineteen (19) degrees fourteen (14) minutes East four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the Mill Site belonging to said Pioneer Quartz Mine and adjoining the same on the east, twenty-four (24) chains and fifty (50) links to post marked 46, thence South fifty-seven (57) links to place of beginning.

And defendant admits and alleges that the southern end of the lode, to-wit, the Pioneer Lode, named and described in said complaint, is truly and correctly described in said complaint as being situate South Eighty-nine (89) degrees thirty-six (36) minutes west three (3) chains and eighty (80) links from the aforesaid place of beginning of said Pioneer Quartz Mine, to-wit, said Lot Number 48, and defendant alleges that the aforesaid Southern end of said lode is and at all times named in said complaint was the place of beginning of all and singular the aforesaid ownership, claim, possession and right of possession of said Argonaut Mining Company of, in and to the said lode.

And defendant alleges that the Pioneer Quartz vein or lode which is alleged in said complaint to have its apex within said Pioneer Quartz Mine, to wit, said Lot No. 48, dips easterly and extends downward to an unknown depth into the earth at an average angle of about forty-

five (45) degrees easterly from the vertical, and in its said course downward passes from and extends out of said Lot Number 48 easterly through and beyond the vertical East side-line thereof, into ground lying easterly from said Lot Number 48 and from said east side line thereof.

And defendant admits and alleges that, as set forth in said complaint, the southern end line of said Pioneer Quartz Mine, to wit, said Lot Number 48, is the beginning and initial boundary thereof, and that the end lines of said Pioneer Quartz Mine, to wit, said Lot Number 48, are not parallel, but, on the contrary, that the northern end line thereof in its course from its west end easterly diverges substantially and at a very large angle toward the north from a direction parallel to said southern end line and initial boundary thereof, such divergence being to the extent of fourteen (14) degrees and forty-five (45) minutes northerly from a direction parallel to said southern end line and initial boundary, the course of said southern end line and initial boundary from its west end easterly being north eighty-nine (89) degrees thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees fifty-one (51) minutes east, and defendant alleges that such divergence between said end lines is easterly and toward and in the direction of the aforesaid dip and downward extension of said Pioneer Quartz vein or lode.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times what-

ever was or now is the owner, in the possession of and entitled to the exclusive possession of, or was or now is the owner of, or was or now is in the possession of, or was or now is entitled to the exclusive or any possession of, 1,589 94-100 linear feet or any other number of linear or other feet or any portion of said Pioneer Quartz Vein or lode throughout its entire depth or to or at any depth or place outside of the surface lines of Pioneer Quartz Mine, to wit, said Lot Number 48, extended downward vertically, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589 94-100 linear feet or any other number of linear or other feet or any part of said Pioneer Quartz Vein or lode, which extends or lies outside the vertical side lines of the surface location of said Pioneer Mine, to wit, said Lot Number 48, and defendant denies that said plaintiff ever owned or now owns or was ever or is now in the possession of or was ever or is now entitled to the exclusive or any possession of 1,589 94-100 linear feet or any other number of linear or other feet or any part of said Pioneer vein or lode, which enters or lies within the land or any land adjoining the Pioneer Mine, to wit, said Lot Number 48.

And defendant denies that said plaintiff at all the times named in said complaint or at any time or times whatever, was or now is the owner of all other veins, lodes and ledges or of any other vein or veins, lode or lodes, ledge or ledges, the tops or apices of which lie within or inside

of the exterior lines of said Pioneer Quartz Mine extended downward vertically, throughout their entire length and depth or throughout or to or at any length or depth or place whatever outside of the vertical side lines of said Pioneer Quartz Mine, and defendant denies that said plaintiff at any time or times whatever was or now is the owner or in any manner entitled to said or any vein or veins, or lode or lodes, or ledge or ledges, or any part of them, or any of them, which in their downward course so far depart from a perpendicular as to extend outside of the vertical side lines of said Pioneer Quartz Mine, and defendant denies that said plaintiff ever was or now is the owner of any part, parcel or portion of any lode, vein or ledge named in said complaint, extending or lying outside the vertical boundaries of said Pioneer Quartz Mine, to wit, said Lot Number 48, whether the top or apex of any such lode or vein or ledge lies within or without the vertical boundaries of said Lot Number 48.

And defendant denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, said defendant by means of the shaft named in said complaint and of levels, drifts, crosscuts and stopes, or by means of any of them, or by means of any shafts or shaft or levels or level or drifts or drift or crosscuts or cross-cut or stopes or stope or by any other means or at all, has penetrated into or upon said or any lands or premises then or ever belonging to said plaintiff or upon the or any ledge or ledges, or lode or lodes or vein or veins having their apices within said Pioneer Quartz Mine, and

defendant denies that at all or any of the times aforesaid or at any time or times whatever, defendant by means of said underground works or by means of any underground works or by any other means or at all, wilfully, wrongfully and unlawfully and without the license or consent of said plaintiff or wilfully or wrongfully or unlawfully or with or without the license or consent of said plaintiff, worked and mined or worked or mined said lodes, ledges, and mining ground or any of them or any lodes or lode or ledges or ledge or mining ground then or ever belonging to said plaintiff, and took out and extracted and converted to its own use or took out or extracted or converted to its own or any use, therefrom or from any ground or premises then or ever belonging to said plaintiff, large or any quantities or quantity of gold bearing quartz of great or any value.

And defendent denies that since August 11th, 1894, and prior to the commencement of this action or at any time or times whatever, defendant extracted three thousand tons or any other number of tons or any quantity of ore and gold bearing quartz or three thousand or any other number of tons or any quantity of ore or gold bearing quartz from the veins, lodes and ledges aforesaid or any of them or from any veins or vein, lodes or lode, ledges or ledge then or ever belonging to said plaintiff, and took out, carried away and converted the same or any thereof to its own use or took out or carried away or converted the same or any thereof to its own or any use, and defendant denies that said ore was of the value of One Hundred

and thirty five Thousand Dollars or of the value of any other sum or of any value at all and defendant denies that said plaintiff was damaged by the acts of said defendant set forth in said complaint or by any acts or act of said defendant in the sum of One Hundred and Thirty-Five Thousand Dollars or in any other sum or in any manner or at all.

And defendant denies that it did ever at any time by means of any shafts or shaft or of any levels or level, drifts or drift, crosscuts or crosscut, stopes or stope or by any means whatever or at all, penetrate into or upon any lands or land or premises or lodes or lode or ledges or ledge or veins or vein belonging in any manner to said plaintiff, and denies that by means of underground works or by any means or at all, said defendant wilfully or wrongfully or unlawfully or without the license and consent of said plaintiff or at all, worked or mined any lodes or lode or ledges or ledge or mining ground belonging in any manner to said plaintiff, and denies that said defendant ever at any time took out or extracted therefrom or converted to its own or any use large or any quantities or quantity of ore, gold bearing rock or quartz of great or any value, and denies that said defendant extracted therefrom three thousand tons or any quantity of ore or gold bearing quartz or any ore or gold bearing quartz whatever, and denies that said defendant ever took away or converted the same or any thereof to its own or any use or at all, and denies that said ore was of the value of One Hundred and Thirty-Five Thousand Dollars or of

any other sum or of any value and denies that said plaintiff was ever damaged by any acts or act of this defendant in the sum of One Hundred and Thirty-five Thousand Dollars or in any other sum or at all.

And defendant denies that it ever entered upon any premises of said plaintiff without its knowledge, license and consent first had and obtained.

And defendant denies that it ever entered upon or penetrated underground any lode or premises belonging to said plaintiff either with or without its consent.

And defendant denies that it ever worked or mined any lode or premises belonging to said plaintiff.

And defendant denies that it ever extracted or took out from any lode or premises belonging to said plaintiff, any ore or any thing whatever.

And defendant denies that it ever took away or converted to its own or any use any gold bearing quartz or any other thing belonging to said plaintiff.

And defendant denies that said plaintiff was ever damaged by any act or acts of defendant in any sum or value whatever.

And defendant denies that defendant threatens to continue the wrongful acts alleged in plaintiff's said complaint, and denies that defendant threatens to continue or to do or perform any wrongful acts whatever, and denies that defendant threatens to mine and work the veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to mine and work or to mine or work any veins or vein or

ledges or ledge or lodes or lode belonging to plaintiff, and denies that defendant threatens to extract, remove and convert to its own use the gold bearing ore and quartz in said veins, ledges and lodes belonging to plaintiff as alleged in said complaint, and denies that defendant threatens to extract or remove or convert to its own or any use the gold bearing ore or quartz in said or any veins or vein or ledges or ledge or lodes or lode belonging to plaintiff.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed, with judgment for its reasonable costs and charges in this behalf sustained.

JOHN M. WRIGHT,
Attorney for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

JOHN BARTON, being first duly sworn, deposes and says: That he is an officer, to wit, the President of Kennedy Mining and Milling Company, the defendant named in the foregoing answer; That he has read said answer and knows the contents thereof; That the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such matters that he believes it to be true.

JOHN BARTON.

Subscribed and sworn to before me this the 12th day of Feby., 1898.

(Notarial Seal.) JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsement]: No. 1408. Original. State of California, County of Amador, In the Superior Court. Argonaut Mining Company (a Corporation) Plaintiff, vs. Kennedy Mining and Milling Company (a Corporation) Defendant.

Answer. Service of the within by delivery of a copy thereof admitted this the 12th day of February, 1898. Lindley & Eickhoff, W. J. McGee, Attorneys for Plaintiff. John M. Wright, Rooms 47 and 10, eighth floor, Mills Building, San Francisco, Attorney for Defendant. Filed Feb. 14, 1898. C. L. Culbert, Clerk. By B. R. Breese, Deputy Clerk. Filed May 6, 1898. A. L. Wyllie, Clerk.

3. AGREED STATEMENT OF FACTS AND STIPULATION SUBMITTING CAUSE.

IN THE

Superior Court of the County of Calaveras,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY,
Plaintiff,

vs.

KENNEDY MINING AND MILLING COMPANY,
Defendant.

No. ——,
Formerly No. 1408 in the Superior Court of Amador County.

Agreed Statement of Facts and Stipulation Submitting Cause.

IT IS STIPULATED AND AGREED that for all the purposes of this action the following facts are true and for the purposes of the trial hereof they shall be deemed and taken as if proved by sufficient evidence, but the admission of such facts respectively as evidence in this cause shall be deemed and taken as duly objected to by the respective parties for want of relevancy and materiality to and competency to prove the issues presented by the pleadings, as fully for all purposes as though such objections were separately made and noted on the record in the customary legal manner.

AND IT IS FURTHER STIPULATED AND AGREED that the admission of each of such facts as evidence and such objections thereto shall be ruled upon by the Court at the time of the Court's decision of the cause after final argument and submission.

Each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the Court the same as though made in open Court or as though specifically set forth in this stipulation.

AND IT IS FURTHER STIPULATED AND AGREED that each of such rulings by the Court upon the admission of such facts as evidence and upon such objections thereto, shall be deemed and taken as duly excepted to by the party against which such ruling shall be made, as fully for all purposes as though such exceptions were separately taken and noted on the record in the customary legal manner.

I.

That the plaintiff in this action is and ever since June 14th, 1893, has been a Corporation duly organized and

existing under and by virtue of the laws of the State of California.

II.

That the Defendant Kennedy Mining and Milling Company is and ever since December 22, 1886, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That on and for more than twenty-five years prior to July 3rd, 1893, the Pioneer Gold and Silver Mining Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

IV.

That at the time of its application for patent for the premises known as "Kennedy Mine" hereinafter described, the Kennedy Mining Company was and for many years thenceforward continued to be a corporation organized and existing under the laws of the State of California.

V.

On October 13, 1870, said Kennedy Mining Company filed its application for patent in the United States Land Office at Sacramento, California, wherein it applied for a patent to the property generally known as the "Kennedy Mine" now designated as Lot Number 44, forming a por-

tion of Sections 17 and 20 in Township 6 North, of Range Eleven East, Mt. Diablo Meridian.

A diagram of the premises for which patent was so applied for was posted in the U. S. Land Office at Sacramento on October 15, 1870.

VI.

On January 13th, 1871, the Pioneer Gold and Silver Mining Company, the immediate predecessor in title of this plaintiff, filed its application for patent in the United States Land Office, at Sacramento, California, wherein and whereby it applied for the issuance to it of a patent for the premises commonly known as and called the Pioneer Quartz Mine now known as Lot No. 48 embracing a portion of N.E. quarter of Section 20, T. 6 N., R. 11 E., Mt. Diablo Meridian, and a diagram of the ground so claimed and for which patent was sought was posted in the office of the Register of said Land Office and upon said claim.

VII.

That there was a surface conflict as to area claimed by said respective applicants for patent, as shown by the proceedings in said Land Office, said conflict occurring on the Northern end of said Pioneer Quartz Mine as applied for, and the southern end of said Kennedy Mine, as applied for.

That thereupon, and on January 13th, 1871, the Register and Receiver of said Land Office made and entered the following order:

"U. S. Land Office,

"Sacramento, Cal., Jan. 13th, 1871.

"In the Matter of the Application
"for Patent and adverse claim of
"The Pioneer Gold and Silver
"Mining Company, a Corporation.

vs.

"The Kennedy Mining Company
"a Corporation, applicant under
"Acts of Congress of July 26th,
"1866, and July 9th, 1870.

"Now on this day upon a careful examination of the "foregoing testimony and the application and records of "said application and adverse claim herein filed, we find "that said adverse claim is such a one as is contemplated "by the 6th section of the Act herein provided and the "regulations of the General Land Office; and that said "adverse claimant is entitled to a search and be heard "relative thereto in the local courts.

"It is therefore hereby ordered that the proceedings in "the case of Kennedy Mining Company, applicant for a "patent be and the same are hereby suspended so far as "the same affects the following described piece or parcel "of land, Commencing at the Northern boundary of said "Pioneer Gold and Silver Mining Company's claim and "running thence southerly on said vein or lode, and sur-"face ground of said Pioneer Company $153^{78}/_{100}$ feet "which portion thereof is claimed by the Kennedy Min-"ing Company, a corporation; said land being in the

"N.E. ¼ of Section 20, Township 6 North, Range 11 "East, Mount Diablo Base and Meridian, until an adjust- "ment can be had of said adverse claim in the local "courts having jurisdiction thereof as required by said "Acts and Regulations herein provided.

"JOHN G. McCALLUM, Register,
"HART FELLOWS, Receiver."

VIII.

That thereafter, and on February 20th, 1871, the said respective applicants for patent, to wit, the Pioneer Gold and Silver Mining Company, and the Kennedy Mining Company, made and entered into an agreement in writing which was filed in the office of said Register and Receiver at Sacramento, and forms a part of the record of each of said applications for patent.

Said agreement is in words and figures following, to wit:

"In the matter of the Applications respectively of the Pioneer Gold and Silver Mining Company, and the Kennedy Mining Company for Patents to Quartz Mining Claims.

WHEREAS, the above named corporations have respectively filed applications in the United States Land office at Sacramento, for Patents, to Quartz Mining Claims in Amador County, California, from which it appears that there is a conflict of claim to a portion thereof.

AND, WHEREAS, the said corporations have mutu-

ally adjusted, settled and compromised such conflict of claims.

NOW, THEREFORE, in consideration thereof these presents WITNESSETH: That the Pioneer Gold and Silver Mining Company withdraws from its application as aforesaid any claim to the northern portion of the quartz lode or lead and surface ground therein described and embracing forty feet and six inches, to wit: Beginning at the Live Oak Tree, the point of commencement mentioned in said application, and extending thence south, the aforesaid forty feet and six inches. And the Kennedy Company abandons all claim to any portion of the said quartz lode or lead and surface ground, south of the point where such extent of forty feet and six inches shall terminate.

And the dividing line between the claims of the respective companies shall be one drawn at right angles with the general course of the lode or lead, and surface ground thereto appurtenant, and at the point hereinbefore designated, to wit: where such extent of forty feet and six inches shall terminate.

WITNESS the private seal of the Pioneer Gold and Silver Mining Company (no corporate seal having yet been provided for that company) and the corporate seal of the Kennedy Mining Company with the signatures of the officers of each company respectively hereunto set this 20th day of February, A. D. 1871.

THE PIONEER GOLD AND SILVER MINING CO.

(Seal)

Louis Mentzel, President
G. Weller, Secretary
F. Hoffman) Trustees Pioneer
George Stoessel) Gold and Silver
Mining Co.

By LOUIS MENTZEL.

SAMUEL W. BRIGHT,
President Kennedy Mining Company.
P. REICHLING,
J. MEEHAN,
Trustees.
[L. S.] C. H. TURNER,
Secretary Kennedy Mining Company."

IX.

That on the 15th day of March, 1871, the Surveyor General of the United States for the State of California issued his instructions to William L. McKim, United States Deputy Mineral Surveyor, to make survey for patent of said Kennedy Quartz Mine.

X.

That in pursuance of said instructions said William McKim during the months of April and May, 1871, made and completed such survey and thereupon made a return of such survey to the United States Surveyor General's office, and on the 19th day of October, 1871, said Surveyor

General approved said survey as so returned and thereafter and on the 11th day of November, 1871, said Kennedy Mining Company entered and paid for said mining claim so surveyed by said McKim and the Receiver of the said United States Land Office thereupon issued his duplicate receipt evidencing such entry and payment.

XI.

That thereafter, to-wit, on the 29th day of July, 1872, the Government of the United States issued to said Kennedy Mining Company its certain letters patent of which the following is a copy:

"GENERAL LAND OFFICE

No. 393.

MINERAL CERTIFICATE

No. 38.

THE UNITED STATES OF AMERICA,

To all to whom these Presents shall come, GREETING:

WHEREAS, in pursuance of the Act of Congress approved July twenty sixth, eighteen hundred and sixty six, entitled "An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof approved July 9th, 1870; and the Act approved May tenth, eighteen hundred and seventy-two, entitled "An Act to promote the development of the mining resources of the United States," there have been deposited in the General Land Office of the United States, the plat and field notes of survey of

the claim of the Kennedy Mining Company, upon the Kennedy Quartz Mine, bearing gold, accompanied by the certificate of the Register of the Land Office at Sacramento, in the State of California, whereby it appears that in pursuance of said acts of Congress the Kennedy Mining Company did, on the eleventh day of November, A. D. 1871, enter and pay for said mining claim or premises, being mineral entry No. 38, in the series of said office, designated by the Surveyor General as Lot number forty-four (44) forming a portion of Sections seventeen (17) twenty (20) in Township Six (6) North of Range eleven (11) East, Mount Diablo Meridian in the Jackson Mining District in the County of Amador, and State of California, in the District of Lands subject to sale at Sacramento embracing twenty-seven and eighty-five hundredths (27.85) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation as hereinafter stated, East, to-wit:

Beginning for the description of that portion of the lode hereby conveyed at a post marked 37, from which the North east corner of section twenty (20) in Township Six (6) North of Range Eleven (11) East, Mount Diablo Meridian, bears North seventy-four (74) degrees twenty-six (26) minutes east, with magnetic variation at seventeen (17) degrees east at the distance of thirty-one (31) chains and seventy-three (73) links; thence from said post south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eight (8)

chains and sixty-two (62) links to post marked 37 situate at southern boundary of the Kennedy Quartz Mine and from said post first hereinbefore described north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east four (4) chains and thirteen (13) links to oak post marked 37, from which the North east corner of said section twenty (20) bears north eighty-one (81) degrees thirty-six (36) minutes east at the distance of thirty (30) chains thirty-one (31) links; Thence from said oak post north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, two (2) chains to Ione and Jackson Road three (3) chains and fifty-five (55) links to ravine, seventeen (17) chains and seventy-seven (77) links to post marked 37 situate on north boundary of claim.

Beginning for the description of the surface ground hereby conveyed at post marked 37 situate at the north west corner of the claim. Thence north seventy three (73) degrees thirty-nine (39) minutes east with magnetic variation at sixteen (16) degrees thirty-seven (37) minutes east seven (7) chains and fifty eight (58) links to post marked 37; Thence south fifteen (15) degrees eighteen (18) minutes east with magnetic variation at seventeen (17) degrees east, eighteen (18) chains and fifty five (55) links to post marked 37; Thence south eight (8) degrees eight (8) minutes west with magnetic variation at seventeen (17) degrees east eleven (11) chains and ninety-one links to post marked 37; Thence south seventy-four (74) degrees fifty one (51) minutes west with magnetic variation

at seventeen (17) degrees east, eight (8) chains and twenty four (24) links to post marked 37; Thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, thirteen (13) chains and fifty nine links to post marked 37; Thence north fifteen (15) degrees eighteen (18) minutes west with magnetic variation at seventeen (17) degrees east, sixteen (16) chains and ninety nine (99) links to the place of beginning.

Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at post marked 37, situate at the south east corner of the land survey hereinbefore described; Thence north eight (8) degrees eight (8) minutes east with magnetic variation at seventeen (17) degrees east, eight (8) chains to Ione and Jackson Road eleven (11) chains and ninety one (91) links to post marked 37; Thence north fifteen (15) degrees eighteen (18) minutes west seventy eight (78) links to a post; Thence north seventy four (74) degrees forty two (42) minutes east two (2) chains to a post; Thence south thirteen (13) degrees forty two (42) minutes east eleven (11) chains and seventy three (73) links to a post; Thence south seventy four (74) degrees fifty one (51) minutes west six (6) chains and forty one (41) links to the place of beginning.

The aggregate area hereby conveyed being twenty seven (27) acres and eighty five hundredths (85-100) of an acre of land, more or less, as represented by yellow shading in the following plat.

(Here follows plat.)

NOW KNOW YE: That the United States of America, in consideration of the premises, and in conformity with said acts of Congress, HAVE GIVEN AND GRANTED, and by these Presents do give and grant unto the said Kennedy Mining Company and to their successors and assigns, the said mining premises hereinbefore described as Lot number Forty-four (44) forming a portion of sections seventeen and twenty in township six (6) North of Range eleven east Mt. Diablo Mer. with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of two thousand and fourteen and thirty hundredths linear feet of the said Kennedy Quartz Mine, vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining and of all veins, lodes, ledges, or deposits, throughout their depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey;

Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect

such exterior parts of said veins, lodes, ledges or deposits; And provided further that nothing in this conveyance shall authorize the grantees herein, their successors or assigns, to enter upon the surface of a mining claim owned or possessed by another;

TO HAVE AND TO HOLD said mining premises together with the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said Kennedy Mining Company and to their successors and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First: That the grant hereby made is restricted to the land hereinbefore described as Lot number forty four with two thousand and fourteen and 32-100 linear feet of the Kennedy Quartz Mine, vein, lode, ledge or deposit, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid the tops or apexes of which lie inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of May, eighteen hundred and seventy-two.

Second: That the premises hereby conveyed, with the exception of the surface may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and

removing the ore from such other vein, lode, ledge or deposit.

Third: That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and right to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth: That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, ULYSSES S. GRANT, President of the United States of America, have caused these Letters to be made patent and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and seventy two, and of the Independence of the United States, the Ninety Seventh.

By the President, U. S. GRANT,

By Z. B. STURGUS, Asst. Secretary.

(Seal of (U. S. Gen.) (Land Office)) C. B. Boynton, Recorder of the General Land Office, Recorded Vol. 4, pages 293 to 300.

Examined."

XII.

That thereafter, to wit, on the 28th day of December, 1886, said Kennedy Mining Company conveyed to said Kennedy Mining and Milling Company all the property and rights conveyed to it the said Kennedy Mining Company, by means of said letters Patent and the only title claimed or asserted by said Kennedy Mining Company in and to said Kennedy Mine is such as is established by the said United States patent.

XIII.

That on the 16th day of June, 1871, the United States Surveyor General for the State of California, issued his instructions to said William L. McKim to make survey for patent for said Pioneer Quartz Mine.

XIV.

That in pursuance of said instructions, said William L. McKim on September 1st, 1871, completed his survey for patent of said Pioneer Quartz Mine, and thereupon returned said survey to the United States Surveyor General's Office, and on the 21st day of December, 1871, said Surveyor General approved said survey.

That said return of survey of said Pioneer Quartz Mine as so approved by said Surveyor General was and is in the words and figures following, to wit:

"FIELD NOTES.

Of the Survey of that certain Gold bearing Quartz Vein or Lode of Gold bearing Quartz Rock known as the

Pioneer Mine

In the Jackson Mining District, and numbered 48, Section 20, Township 6 North, Range 11 East Mount Diablo Meridian, in the County of Amador, State of California, by William L. McKim, United States Deputy Mineral Surveyor, in pursuance with special instructions from J. R. Hardenbergh, U. S. Surveyor General for California, bearing date the 10th day of June A. D. 1871.

Survey commenced, August 31, 1871.
Survey completed, September 1, 1871.

Field Notes

Of the line along the vein or lode are as follows, viz:

Beginning at a post marked 46 standing at the southern boundary of said line, from which the ¼ section post between section 20 and 21, Township 6 North, Range 11 East of Mount Diablo Meridian bears

Chain 23.91	N. 89° 36′ E.	Variation 17° E. Distant A. White Oak, 30 in. dia. bears N. 86° 44′ W. O. 40 chs. dist. A black Live Oak Stump (and second growth) 30 in diam bears S. 78° 44′ E. 1.34 chs. dist.

Thence

N. 19° 14′ W. along said line of vein

Variation 17° E.

Chains	
2.14	An open cut on the West of the line.
2.68	An open cut on the East of the line.
9.00	An open cut on the East of the line.
19.34	A shaft 60 feet deep.
22.99	A shaft 20 feet deep.
23.09	South end of open cut on the vein.
24.09	North end of open cut and post marked 37 and 46, and common to the southern boundary of the center line of the Kennedy Quartz Mine, and Northern boundary of the center line of the Pioneer Quartz Mine, from which A Pine, 8 in. dia. bears N. 2° 20′ E. 0.47 chs. dist. A Pine 6 in diam. bears S. 63° 54′ E. 0.91 chs. dist.

Field Notes.

Of the exterior boundaries of the land claimed with the Pioneer Mine are as follows, to wit:

Beginning at a post marked 46, from which the ¼ Section post on the line between Sections 20 and 21 bears

Chains		
	N. 89° 36′ E.	Variation 17° E.
20.11		Distant, Thence
	S. 89° 36′W.	Variation 17° E.
3.80		A post marked 46 and Southern boundary of the center line of said Vein or Lode.
7.80		Set a post marked 46 and S. W. corner of the land claimed
	N. 19° 14′ W.	with said Mine. Thence along the Western boundary of said land.
		Variation 17° E.
23.07		Set a post marked 46 and N. W. corner of the land claimed with the Pioneer Quartz Mine, from which a post marked 37 at the S. W. corner of the land claimed with the Kennedy
	S. 74° 51′ W.	Mine bears, 32 links distant.
	N. 74° 51′ E.	Thence, along the Southern boundary of the land claimed with the Kennedy Mine, a post
3.80		marked 37 and 46 and common to the Southern boundary of the center line of the Vein or Lode of the Kennedy Mine and Northern boundary of the center line of the Vein or Lode of the Pioneer Mine.

7.60		Set a post marked 46 at the N. E. corner of the land claimed with the Pioneer Mine, from
Chains		which a post marked 37 at the S. E. corner of the land claimed with the Kennedy
	N. 74° 51′ E.	Mine, bears 32 links distant.
	S. 19° 14′ E.	Thence, along the Eastern line of said claim.
		Variation 17° E.
3.50		Entrance of tunnel on the east
4.03		end of line. Set a post marked 46 for S. W. corner of land claimed as a Mill Site.
4.25		Entrance of Tunnel on the West of line.
24.50		Set a post marked 46. Thence
	South	Variation 17° E.
0.57		To place of beginning, containing 18.23 acres.

Field Notes

Of the exterior boundaries of the land claimed with the Pioneer Mine as a Mill Site.

Beginning at a post marked 46 and N. E. corner of the land claimed with the Pioneer Mine. Thence,

Chains N. 74° 51′ E. along the Southern boundary

of the lands of the Kennedy Mine and Mill Site.

Variation 17° E.

0.32 A post marked 37 and S. E. corner of the land claimed with the Kennedy Mine and S. W. corner of land claimed as a Mill Site.

Chains

6.73 A post marked K. M. S. and S. E. corner of land claimed with the Kennedy Mine as a Mill Site. Thence

S. 37° 38′ E. Variation 17° E.

7.05 Set a post for S. E. corner Thence

S. 89° 36′ W. Variation 17° E.

9.55 A post marked 46 at the intersection of the East line of the land claimed with the Pioneer Mine. Thence

N. 19° 14′ W. along the Eastern boundary of the land claimed with said Mine.

Variation 17° E.

4.03 To the place of beginning.

Containing 3.99 acres.

Report.

U. S. Deputy Surveyors Office.
Jackson, Novr 14, 1871.

Hon. J. R. Hardenbergh
U. S. Surveyor General
For California

Sir:

In compliance with Instructions from your office, bearing date June 16th 1871, I herewith submit the following report and return of the improvements and character of the same; in and upon that certain Gold-bearing Quartz Vein or Lode of Gold-bearing Quartz Rock, Known as the Pioneer Mine, situate in Jackson Mining District, Section 20, Township 6 North, Range 11 East, Mount Diablo Meridian, County of Amador, State of California.

Total value of labor and improvements.

From the affidavits of S. W. Brignt, C. Weller and Frank Hoffman, herewith exhibited and marked respectively, Exhibits "C," "D" and "E," and made a part of this return and report.

The least amount set forth in said affidavits as the value of labor and improvements in and upon said Pioneer Mine, is Seven Thousand Dollars.

Character of improvements.

1st One Timbered Tunnel 684 feet in length.
One Tunnel 100 feet in length.
One Tunnel 60 feet in length.

2nd One shaft 4 x 6 feet, 75 feet in depth.
One shaft 4 x 6 feet, 75 feet in depth.

3rd Several open cuts and prospect holes.

There is no mill attached to the Mine.

The general dip of the vein is about 45° and dips to the East.

The elevation of the mine above the sea is about 1300 feet, and it is situated on the main road from Jackson to Sutter.

Very respectfully
Your obt servt
William L. McKim
U. S. Mineral Surveyor
For Amador Co Cala.

LIST OF NAMES.

A list of the names of the individuals employed to assist in running, measuring, or marking the lines and corners described in the foregoing Field Notes of the Final Survey of that certain Mining Claim Known as the Pioneer Mine No. 46 a Gold bearing Quartz vein or lode of gold bearing quartz rock in the Jackson Mining District, Section 20, T. 6 N. R. 11 E. of Mt. Diablo Meridian Amador Co Cala showing the respective capacities in which they acted.

William L. McKim, U. S. Dept. Surveyor Compassman.
D. D. Reaves, Chainman.
James F. Purslowe, Chainman.
....., Axeman.

FINAL OATHS OF ASSISTANTS.

We hereby certify that we assisted William L. McKim, U. S. Mineral Deputy Surveyor, in surveying that certain Gold bearing Quartz Vein, or Lode of Gold bearing Quartz Rock, known as the Pioneer Mine in Jackson Mining District, No. 46 Township 6 North Range 11 East of Mt. Diablo Meridian, and that said survey has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments planted according to the instructions furnished by the Surveyor-General.

D. D. Reaves.
James F. Purslowe.

Subscribed and Sworn to before me this 1st day of September, 1871.

William L. McKim,
U. S. Deputy Surveyor.

FINAL OATH OF DEPUTY SURVEYOR.

I, William L. McKim, U. S. Mineral Deputy Surveyor, do solemnly swear that, in pursuance with Instructions

from J. R. HARDENBERGH, United States Surveyor-General for California, bearing date the 16th day of June A. D. 1871, I have well, faithfully and truly, in my own proper person, and in strict conformity with the instructions furnished by the Surveyor-General, the Surveying Manual, and the laws of the United States, surveyed all those parts or portions of that certain Mining Claim, Known as the Pioneer Mine, a Gold bearing Quartz Vein or Lode of Gold bearing Quartz Rock, situate in the Jackson Mining District, Section 20, Township 6 North, Range 11 East of Mount Diablo Meridian, County of Amador, State of California, as are represented in the foregoing Field Notes as having been surveyed under my direction; and I do further solemnly swear that all the corners of said surveys have been established and perpetuated in strict accordance with the Surveying Manual and printed instructions, and that the foregoing are the true and original Field Notes of such Survey.

William L. McKim,
U. S. Deputy Surveyor.

Subscribed and sworn to before me, this 4th day of December, 1871.

R. M. BRIGGS,
United States Commissioner for
Amador County California."

XV.

That thereafter and on the 23rd day of February, 1872, the said Pioneer Gold and Silver Mining Company en-

tered and paid for said mining claim as so surveyed by said William L. McKim, and the Receiver of said United States Land Office thereupon issued his duplicate receipt evidencing such entry and payment.

XVI.

That thereafter to wit, on the 12th day of August, 1872, the Government of the United States issued to said Pioneer Gold and Silver Mining Company its certain Letters Patent of which the following is a copy:

"GENERAL LAND OFFICE

No. 406.

MINERAL CERTIFICATE

No. 63.

"THE UNITED STATES OF AMERICA,

To all to whom these Presents shall come, GREETING:

WHEREAS, in pursuance of the Act of Congress approved July twenty sixth, eighteen hundred and sixty six, entitled "An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes," the act amendatory thereof, approved July ninth eighteen hundred and seventy; and the act approved May tenth, eighteen hundred and seventy-two, entitled "An Act to promote the development of the mining resources of the United States" there have been deposited in the General Land Office of the United States the plat and field notes of survey of the claim of the Pioneer Gold and Silver Mining Company upon the Pioneer Quartz lode bearing gold, accompanied by the Certificate of the Reg-

ister of the Land Office at Sacramento, in the State of California, whereby it appears that in pursuance of said Acts of Congress, the Pioneer Gold and Silver Mining Company did, on the 23rd day of February, A. D. 1872, enter and pay for said mining claim or premises, being mineral entry No. 63, in the series of said office, designated by the Surveyor General as Lot Number forty-eight (48) embracing a portion of the north-east quarter of section twenty (20) in Township six north of range eleven east Mt. Diablo Meridian in the Jackson Mining District, in the County of Amador and State of California, in the district of lands subject to sale at Sacramento, embracing twenty-two and twenty-two hundredths (22.22) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation at seventeen (17) degrees east, to wit:

Beginning for the description of said land claimed with said lode at a post marked 46, from which the quarter section corner between sections twenty (20) and twenty-one (21) in Township six (6) north of range eleven (11) east, Mount Diablo Meridian, bears north eighty-nine (89) degrees thirty-six (36) minutes east at the distance of twenty (20) chains and eleven (11) links; thence from said post marked 46 south eighty-nine (89) degrees thirty six (36) minutes west three (3) chains and eighty (80) links to post marked 46 at southern end of said lode, seven (7) chains and eighty (80) links to post marked 46; Thence north nineteen (19) degrees fourteen (14) minutes west

twenty three (23) chains and seven (7) links to post marked 46 at the north west corner of the claim, from which post marked 37 situate at the south-west corner of the Kennedy Company's claim, upon the Kennedy mine bears south seventy four (74) fifty one (51) minutes west at the distance of thirty two (32) links; Thence from said post marked 46 north seventy four (74) degrees fifty one (51) minutes east along the southern boundary of the Kennedy Company's claim three (3) chains and eighty (80) links to post marked 37 and 46—the same being situate at the northern end of the said Pioneer Gold and Silver Mining Company's claim and at the southern end of the said Kennedy Company's claim, seven (7) chains and sixty (60) links to post marked 46, from which a post marked 37 situate at the south east corner of the said Kennedy Company's claim bears north seventy four (74) degrees fifty one (51) minutes east at the distance of thirty two (32) links; Thence from said post marked 46 south nineteen (19) degrees fourteen (14) minutes east, four (4) chains and three (3) links to post marked 46, situate at the southwest corner of the mill site hereby conveyed, twenty-four (24) chains and fifty (50) links to post marked 46; thence south fifty-seven (57) links to the place of beginning, containing eighteen (18) acres and twenty three hundredths (23-100) of an acre of land, more or less.

Beginning for the description of the mill site hereby conveyed for the convenient working of the mine at a post marked 46, situate at the north east corner of the land hereinbefore described; Thence North seventy-four (74)

degrees fifty one (51) minutes east along the southern boundary of the Kennedy Company's mill site thirty two (32) links to a post marked 37 situate at the south west corner of said Kennedy Company's mill site, six (6) chains and seventy three (73) links to a post marked K. M. S. situate at south east corner of said Kennedy Company's Mill site; Thence South thirty-seven (37) degrees thirty eight (38) minutes east seven (7) chains and five (5) links to post; Thence south eighty nine (89) degrees thirty six (36) minutes west nine (9) chains and fifty five (55) links to post marked 46 hereinbefore described as situate at the southwest corner of said mill site; Thence north nineteen (19) degrees fourteen (14) minutes west four (4) chains and three (3) links to the place of beginning, containing three (3) acres and ninety nine hundredths (99-100) of an acre of land, more or less, which together with the land claimed with said lode, aggregates twenty two (22) acres and twenty two hundredths (22-100) of an acre of land, more or less, as represented by yellow shading in the following plat.

(Here follows plat.)

NOW KNOW YE, That the United States of America in consideration of the premises and in conformity with the said acts of Congress, HAVE GIVEN AND GRANTED, and by these presents do give and grant, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns the said mining premises hereinbefore described as Lot number forty-eight (48) embracing a portion of the north east quarter of section

twenty (20) in township six (6) north of Range eleven (11) east Mt. Diablo Meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred and eighty-nine and 94-100 linear feet of the said Pioneer Quartz vein, lode, ledge or deposit, as hereinbefore described throughout its entire depth, although it may enter the land adjoining, and of all the veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey;

PROVIDED, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits.

AND PROVIDED FURTHER, That nothing in this conveyance shall authorize the grantees herein, their successors or assigns to enter upon the surface of a mining claim owned or possessed by another;

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities and ap-

purtenances of whatsoever nature thereunto belonging, unto the said Pioneer Gold and Silver Mining Company and to their successors and assigns forever, subject nevertheless, to the following conditions and stipulations:

First--That the grant hereby made is restricted to the land hereinbefore described as Lot Number forty-eight (48) with fifteen hundred and eighty nine and 94-100 linear feet of the Pioneer Quartz vein, lode, ledge or deposit throughout its entire depth as aforesaid together with all other veins, lodes, ledges or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie inside of the exterior lines of said survey, and to which no valid adverse claim existed on the tenth day of May eighteen hundred and seventy two.

Second—That the premises hereby conveyed with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third—That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and ac-

knowledged by the local laws, customs and decisions of courts.

Fourth—That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, ULYSSES S. GRANT, President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington the twelfth day of August in the year of our Lord one thousand eight hundred and seventy two and of the Independence of the United States the ninety-seventh.

BY THE PRESIDENT, U. S. GRANT.
BY Z. B. STURGESS, Asst. Secretary.
(Seal.) C. B. BOYNTON, Recorder of the General Land Office."

Recorded Vol. 4, pages 393 to 401."

XVII.

That attached to said several patents was a plat delineating the boundaries and surface lines described in said patents respectively. Said plat attached to said patent to said Kennedy Mining Company delineates the surface ground as the same is marked and designated on "Exhibit A," annexed hereto as Lot Forty-four (44) Kennedy Quartz Mine; and the plat annexed to said patent

to said Pioneer Gold and Silver Mining Company delineates the surface ground described in said last named patent as shown upon "Exhibit A" annexed hereto, marked Lot forty-eight (48) Pioneer Quartz Mine.

XVIII.

That the line A—B— marked upon the diagram "Exhibit A" is the northern end line of said Pioneer Quartz Mine as patented, and to the extent of the length of said line, to wit: seven (7) chains and sixty (60) links, is coincident with the southern end line of said Kennedy Quartz Mine as described in said Patent to said Kennedy Mining Company.

The course of said line A—B— is north seventy-four (74) degrees fifty-one (51) minutes east. The dotted line B—B′ is said line A—B— produced indefinitely in its own direction.

XIX.

That said Argonaut Mining Company has sunk an incline shaft which has its collar or top in the Pioneer Mill Site described in said patent to said Pioneer Gold and Silver Mining Company at a point marked "B" on said diagram "Exhibit A," and descends into the earth downward from its collar easterly at an average angle approximately sixty-two degrees from the place of the horizon.

XX.

Traversing said Kennedy and Pioneer Mines in a general northerly and southerly direction is a ledge of rock

in place bearing gold. It is a well defined vein varying in width from three inches to thirty feet lying between well defined walls, and dips and descends into the earth easterly at an average angle of approximately forty degrees from the plane of the horizon until it reaches a point in said Argonaut shaft about four hundred and forty feet below the collar or top thereof below which point said vein dips and descends into the earth easterly at an average angle of approximately sixty three degrees from the plane of the horizon, the general easterly direction of said dip of said vein being indicated by the arrows on "Exhibit A."

XXI.

The general course of said vein is S. 19° 14′ E. or N. 19° 14′ W. as is apparent on the surface by the outcrop visible in said Pioneer Mine Lot 48. Said vein in its course southerly passes out of said Kennedy Quartz Mine crossing said line A—B at a point thereon marked "Z" on said "Exhibit A," and enters the Pioneer ground, thence pursuing its general southerly course towards the southern end line of said Pioneer Quartz Mine, which it crosses.

XXII.

Within the surface boundary of the tract designated on "Exhibit A" as the Kennedy Mill Site, and at the point marked "X" on "Exhibit A" the Kennedy Mining and Milling Company have sunk a shaft, which is vertical or nearly so to the depth of Three hundred and seventy six

feet, or thereabouts, at which depth it encounters the vein or ledge above described, as it descends into the earth from the overlying apex or outcrop.

Thence said shaft is an incline following the vein on its dip or downward course into the earth to a present depth of approximately two thousand two hundred and fifty feet.

XXIII.

From said shaft the defendant herein has extended certain levels and drifts southerly on said vein, some of which are shown in horizontal projection on the diagram marked " Exhibit A " hereto annexed and marked respectively 1450, 1550, 1650 and 1750 levels. Some of these levels have been by said defendant extended on said vein southerly and beyond a vertical plane drawn through the line A—B produced in the direction of B′.

That between the 8th day of October, 1895, and the 12th day of December, 1895, the defendant extracted, removed and converted to its own use Two Thousand Six Hundred and Four (2604) tons of gold bearing ore from said vein southerly from and beyond said vertical plane, but within the vertical boundaries of the Silva Quartz Mine delineated on said Exhibit A, and hereinafter described.

That the gross value of said 2604 tons of said ore so extracted, removed and converted by defendant was the sum of Sixty two thousand two hundred and eighteen 45-100 (62,218.45) Dollars.

That the aggregate cost of mining and milling said ore

was the sum of Six thousand one hundred and nineteen 40-100 (6119.40) Dollars, which amount plaintiff consents may be deducted from the gross value of the ore as above stated, in the event the Court should determine that Plaintiff is entitled to recover in this action.

The net profit realized by said defendant from said ore was the sum of Fifty six thousand and ninety-nine 95-100 (56,099.95) Dollars in gold.

XXIV.

That the vein exposed in defendant's underground workings south of the vertical plane drawn through the line A—B produced in the direction B′ is the same vein which has its top or apex in the Kennedy Quartz Mine and in the Pioneer Quartz Mine, and that such vein is continuous from the top or apex in both properties downward to the lowest depths, and that said vein at all points below the surface continues on its course in a general southerly direction indefinitely towards the south end line of the Pioneer Quartz Mine, which it crosses, and that the aforesaid 2604 tons of ore were extracted by defendant from said vein south of said vertical plane drawn through the line A—B—B′.

XXV.

Said vein is the identical vein mentioned in the Kennedy Patent as the Kennedy vein or lode and in the Pioneer Patent as the Pioneer vein or lode.

XXVI.

That plaintiff became the owner of said Pioneer Quartz Mine by deed duly executed July 3, 1893, by the Pioneer Gold and Silver Mining Company, the patentee named in the Pioneer Patent hereinbefore described, and has ever since been and now is such owner.

XXVII.

That the defendant became the owner of said Kennedy Mine by mesne conveyances from the patentee by deed dated December 28th, 1886, and has ever since and now is such owner.

XXVIII.

Delineated upon said diagram hereto annexed marked "Exhibit A" is a property known as the Silva Quartz Mine, Lot No. 86. The surface of said Silva Quartz Mine overlies so much of the dip of said Pioneer and Kennedy vein as may be found between vertical planes drawn downward through the boundaries of said Silva Quartz Mine. That the defendant is and ever since the sixth day of February, 1893, has been the owner of said Silva Quartz Mine by virtue of a quartz mining patent issued to it on that day under the mining laws of Congress which patent is in the words and figures as follows, to wit:

"GENERAL LAND OFFICE, NO. 22540.

MINERAL CERTIFICATE, NO. 1521.

THE UNITED STATES OF AMERICA.

To all to whom these Presents shall come, GREETING: WHEREAS, in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two and Legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate No. 1521, of the Register of the Land Office at Sacramento, in the State of California, accompanied by other evidence, whereby it appears that The KENNEDY MINING AND MILLING COMPANY did, on the thirteenth day of October A. D. 1892, duly enter and pay for that certain mining claim or premises known as the Silva Quartz Lode Mining Claim, designated by the Surveyor General as Lot No. 86, embracing a portion of Section Twenty, in Township Six, North of Range eleven east, Mount Diablo Meridian, in the Jackson Mining District, in the County of Amador and State of California in the District of Lands subject to sale at Sacramento and bounded, described and platted as follows, with magnetic variation as hereinafter stated.

Beginning at an iron post situate at the north east corner of Lot No. 61, the Volunteer Quartz Lode claim.

Thence, first course magnetic variation sixteen degrees and thirty-five minutes east, north sixty degrees and thirty one minutes east, thirty-five feet to a post marked "X."

Thence, second course, magnetic variation sixteen degrees and thirty five minutes east, south thirty five de-

grees and ten minutes east one hundred and sixty seven feet to a post marked " IX."

Thence, third course, magnetic variation sixteen degrees and thirty-five minutes east, north eighty nine degrees and forty five minutes east one hundred and three feet to a post marked " VIII," from which a shaft bears South sixty-four degrees and twenty minutes east one hundred and twenty six feet distant; and a shaft bears north fifty six degrees and ten minutes east three chains and thirty four links distant.

Thence, fourth course, magnetic variation, sixteen degrees, and twenty five minutes east, north twenty four minutes west four hundred and seventy feet to a post marked " VII."

Thence, fifth course, magnetic variation fifteen degrees and fifty five minutes east, north eighty nine degrees and twenty minutes east two hundred and thirteen and two tenths feet to a post five inches square marked " V," in mound of stone, from which a blazed live oak five inches in diameter bears north fifty degrees and fifteen minutes east forty three and one half links distant; and the corner common to sections sixteen, seventeen, twenty and twenty one, in township six North of range eleven east, Mount Diablo Meridian bears north eighty nine degrees and twenty minutes east ten chains distant.

Thence, sixth course, magnetic variation fifteen degrees and thirty nine minutes east, south ten minutes east, one thousand three hundred and six and eight

tenths feet to a post marked "IV," being the southeast corner of claim.

Thence, seventh course, magnetic variation sixteen degrees and twenty-five minutes east, south eighty-nine degrees and twenty minutes west, six and six tenths feet to an iron bar two inches in diameter, projecting three inches above ground, situate in a gate way.

Thence, eighth course, magnetic variation sixteen degrees and twenty-five minutes east, north thirty one degrees and forty eight minutes west, six hundred and sixty three and three tenths feet to a post marked "II."

Thence, ninth course, magnetic variation sixteen degrees and thirty five minutes east, north twelve degrees and forty minutes west, three hundred and ninety eight feet to said iron post, the place of beginning; said lot No. 86 extending one thousand three hundred and sixteen and seven tenths feet in length, along said Silva Quartz vein or lode, and containing seven acres and two [illegible] hundredths of an acre of land, more or less.

NOW KNOW YE, That there is therefore hereby GRANTED by the United States unto the said Kennedy Mining and Milling Company and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Silva Quartz vein, lode or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 86 extended downward vertically, although such

veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; Provided, That the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 86, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges: And Provided Further, That nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to its successors and assigns forever; subject nevertheless to the above mentioned and to the following conditions and stipulations:

First: That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second: That the premises hereby granted shall be held subject to any vested and accrued water rights for

mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of the Courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, BENJAMIN HARRISON, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington the sixth day of February in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

BY THE PRESIDENT; BENJAMIN HARRISON.

By E. Macfarland, Asst. Secretary.

(Seal of) D. P. Roberts,
(the U. S.) Recorder of the General Land Office."
(Gen. L. O.)

Recorded Vol. 234, pages 57 to 60 inclusive."

IT IS NOW STIPULATED AND AGREED that this cause be forthwith submitted to the Court upon the foregoing agreed statement of facts and stipulations together with the facts established by the pleadings, for its decision upon the respective rights of the parties and for judgment accordingly.

Nothing herein shall be construed to deprive either party of the right to appeal or sue out a writ of error to the appropriate tribunal having jurisdiction for the purpose of reviewing any judgment which may be entered pursuant to decision rendered as contemplated in this stipulation, but the right to have said judgment reviewed by the Appellate Courts by appropriate proceedings in that behalf is expressly reserved by both parties.

Dated, September 13th, 1898.

LINDLEY & EICKHOFF,
W. J. McGEE,
F. J. SOLINSKY,
Attorneys for Plaintiff.

JOHN M. WRIGHT,
BYRON WATERS,
JOHN J. SNYDER,
Attorneys for Defendant.

[Endorsed]: Formerly No. 1408 in the Superior Court of Amador County. In the Superior Court of Calaveras County, State of California. Argonaut Mining Company, Plaintiff, vs. Kennedy Mining & Milling Company, De-

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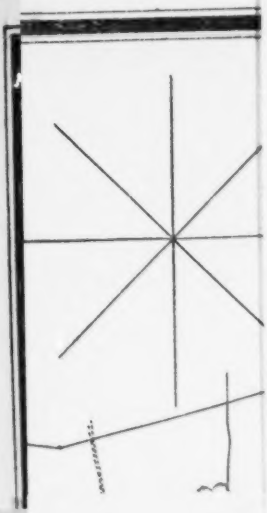

FOLD OUT IS TOO LARGE TO BE FILMED

fendant. Agreed Statement of Facts. Filed Sept. 14, 1898. A. L. Wyllie, Clerk. By W. S. Coulter, Deputy.

4. STIPULATION EXTENDING TIME FOR FILING OBJECTIONS.

IN THE

Superior Court of the County of Calaveras,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY, *Plaintiff*,

vs.

KENNEDY MINING AND MILLING COMPANY, *Defendant*.

No. 1408.

Stipulation Extending Time for Filing Objections.

Whereas, by stipulation heretofore made herein, a certain statement of the facts in this case was agreed upon; and

Whereas, in said stipulation it was provided that "each or either party may serve on the opposite party and file in this cause within twenty days from this date" [Sept. 13, 1898] "a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality

to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled upon by the Court the same as though made in open court or as though specifically set forth in this stipulation."

Now it is hereby stipulated and agreed that the time for serving and filing such objections is hereby extended to and to include the 12th day of October, 1898.

LINDLEY & EICKHOFF,
W. J. McGEE, and
F. J. SOLINSKY,
Attorneys for Plaintiff.

JOHN M. WRIGHT,
BYRON WATERS,
JOHN J. SNYDER,
Attorneys for Defendant.

[Endorsement]: No. 1408. In the Superior Court of the County of Calaveras, State of California. Argonaut Mining Co., Plaintiff, v. Kennedy Mining and Milling Company, Defendant. Stipulation extending time for filing objections. Filed October 4th, 1898. A. L. Wyllie, Clerk.

5. DEFENDANT'S OBJECTIONS TO CERTAIN FACTS IN THE AGREED STATEMENT.

IN THE

Superior Court of the County of Calaveras,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY,
Plaintiff,

vs.

KENNEDY MINING AND MILLING COMPANY,
Defendant.

No. 1408.

Defendant's Objections.

Whereas, by stipulation heretofore made herein, a certain statement of the facts in this cause was agreed upon, and

Whereas, in said stipulation it was provided that "each or either party may serve on the opposite party and "file in this cause within twenty days from this date" (Sept. 13th, 1898) "a statement in writing setting forth "specifically its objections to each fact the admission of "which is objected to by it for want of relevancy and "materiality to and competency to prove the issues pre- "sented by t' e pleadings or for want of relevancy or

"materiality to or competency to prove such issues, and "such written statement of objections shall be deemed "and taken as part of the record of the cause and the ob- "jections therein stated shall be ruled upon by the court "the same as though made in open court or as though "specifically set forth in this stipulation."

NOW IN ACCORDANCE WITH THE RIGHT SO STIPULATED AND RESERVED, THIS DEFENDANT HEREBY SPECIFICALLY SETS FORTH, MAKES AND CLAIMS ITS OBJECTIONS TO THE ADMISSION OR CONSIDERATION BY THE COURT AS EVIDENCE OR AS POSSESSING PROBATIVE FORCE HEREIN, OF THOSE CERTAIN FACTS SPECIFIED IN SAID AGREED STATEMENT AS FOLLOWS, to-wit:

First. All and singular each and every the facts stated in paragraph IV of said agreed statement, showing among other matters and things, the corporate capacity of Kennedy Mining Company;

Second. All and singular each and every the facts stated in paragraph V of said agreed statement, showing among other matters and things, that on October 13, 1870, said Kennedy Mining Company applied for a patent to the Kennedy Quartz Mine, Lot No. 44, and that a diagram of said mine was posted in the U. S. Land Office at Sacramento, California, on October 15, 1870;

Third. All and singular each and every the facts stated in paragraph VII of said agreed statement, show-

ing among other matters and things, that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the Register and Receiver of the Land Office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

Fourth. All and singular each and every the facts stated in paragraph VIII of said agreed statement, showing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. Land Office at Sacramento, California, said agreement being set forth in *haec verba* in said paragraph VIII;

Fifth. All and singular each and every the facts set forth in paragraph IX of said agreed statement, showing among other matters and things, that on March 15, 1871, the U. S. Surveyor General for California instructed William L. McKim, a U. S. Deputy Mineral Surveyor, to make patent survey of said Kennedy Quartz Mine;

Sixth. All and singular each and every the facts stated in paragraph X of said agreed statement, showing among other matters and things, that said McKim surveyed said Kennedy Quartz Mine during April and May,

1871, and thereupon returned said survey to the U. S. Surveyor General's Office, and that on October 19, 1871, said Surveyor General approved said survey, and that on November 11, 1871, said Kennedy Mining Company entered and paid for the mining claim so surveyed.

Defendant bases its aforesaid objections to the admission as evidence herein of the facts aforesaid, upon the following grounds, to-wit:

(*a*) All and singular each and every the facts so objected to, are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) All and singular each and every the facts so objected to, are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Kennedy Mining Company for said Kennedy Quartz Mine, Lot No. 44, on July 29, 1872, as shown by paragraph XI of said agreed statement; and

(*c*) All and singular each and every the facts so objected to, relate only to the surface area to be embraced within said Kennedy Quartz Mine, Lot No. 44, and in no wise relate to any extra lateral right claimed as attaching to said Kennedy Quartz Mine, Lot No. 44, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said Lot No. 44; and

(*d*) The agreement as to the common boundary line between said Kennedy Quartz Mine and the Pioneer Quartz Mine, set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to

said Kennedy Quartz Mine, nor was said agreement ever recorded in the office of the County Recorder of the County of Amador, State of California, in which said Kennedy Quartz Mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy Quartz Mine, Lot No. 44, or at the time when it acquired its title to the Silva Quartz Mine, Lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement; and

(c) Defendant specially sets up and claims that all and singular each and every the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, are irrelevant and immaterial to all and singular each and every the issues in this cause and are incompetent as evidence to prove any of the facts alleged in the complaint herein, because, as is shown by the facts set forth in paragraph XXIII of said agreed statement, all of the ores in dispute herein were extracted by defendant from places within the vertical boundaries of said Silva Quartz Mine, and without the vertical end boundaries of said Kennedy Quartz Mine indefinitely extended, and because, notwithstanding the existence of the facts set forth in said paragraphs IV, V, VII, VIII, IX and X of said agreed statement, this defendant, by reason of its ownership of said Silva Quartz Mine, Lot No. 86, which ownership is shown by the facts set forth in para-

graph XXVIII of said agreed statement, was at all of the times of the trespasses alleged in the complaint herein, justly entitled, under the statutes of the United States by authority of which said patent to said Silva Quartz Mine was issued, to-wit, under Chapter Six of Title Thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, to the exclusive right and title to take and hold all of said ores and every part of the substance embraced within the area of said Silva Quartz Mine as described in said Silva patent; and

(f) As shown by the facts stated in paragraph XII of said agreed statement, defendant makes no claim of title or right to the ores forming the subject of dispute in this cause, by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

Seventh. All and singular each and every the facts set forth in paragraph XI of said agreed statement, showing among other matters and things, that on July 29, 1872, the government of the United States issued to said Kennedy Mining Company a patent for said Kennedy Quartz Mine, Lot No. 44, said patent being set forth in *haec verba* in said paragraph XI;

Eighth. All and singular each and every the facts set forth in paragraph XII of said agreed statement, in so far as such facts show or tend to show that on December 28,

1886, said Kennedy Mining Company conveyed to this defendant all the property and rights conveyed to it, the said Kennedy Mining Company, by means of said letters patent issued July 29, 1872.

Defendant bases its aforesaid objections to such facts set forth in said paragraphs XI and XII of said agreed statement, upon the following grounds, to-wit:

(*a*) All and singular each and every of such facts are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44; and

(*c*) Plaintiff cannot establish a title in itself to the ores in dispute in this cause by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy Quartz Mine, nor by showing the limitations of the patent to said Kennedy Quartz Mine; but plaintiff must rely upon and clearly show its own title to said ores; and

(*d*) Defendant claims title to the ores in dispute in this cause by reason of its ownership of said Silva Quartz Mine, Lot No. 86, and not by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

Ninth. All and singular each and every the facts set

forth in paragraph XVII of said agreed statement, and the facts shown by the plat designated as "Exhibit A" in said paragraph XVII, in so far as such facts show or tend to show the boundary lines and surface form of said Kennedy Quartz Mine, Lot No. 44;

Tenth. All and singular each and every the facts set forth in paragraph XVIII of said agreed statement, in so far as such facts show or tend to show the southern end line of said Kennedy Quartz Mine and the coincidence of the northern end line of said Pioneer Quartz Mine with a part of the southern end line of said Kennedy Quartz Mine;

Eleventh. All and singular each and every the facts set forth in paragraph XX of said agreed statement, in so far as such facts show or tend to show the existence of a ledge of rock in place bearing gold within said Kennedy Quartz Mine, Lot No. 44, and the nature and extent of said vein within said Kennedy Quartz Mine;

Twelfth. All and singular each and every the facts set forth in paragraph XXI of said agreed statement, in so far as such facts show or tend to show the existence and course of a vein in said Kennedy Quartz Mine, Lot No. 44, and that said vein crosses out of said Kennedy Quartz Mine into said Pioneer Quartz Mine;

Thirteenth. All and singular each and every the facts set forth in paragraphs XXIV and XXV of said agreed statement, in so far as such facts show or tend to show the existence of a vein or any vein in said Kennedy

Quartz Mine or the identity of such vein or any vein in said Kennedy Mine with the vein from which defendant extracted the ores in dispute south of the line A—B—B' but within the vertical boundaries of said Silva Quartz Mine, Lot No. 86;

Fourteenth. All and singular each and every the facts set forth in paragraph XXVII of said agreed statement showing that defendant became the owner of said Kennedy Quartz Mine on December 28, 1886, and ever since has been and now is such owner.

And defendant bases its aforesaid objections to the admission as evidence herein of the aforesaid facts set forth in said paragraphs XVII, XVIII, XX, XXI, XXIV, XXV and XXVII of said agreed statement, on the following grounds, to-wit:

(*a*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) Defendant makes no claim of right or title to the ores in dispute in this cause by reason of its ownership of said Kennedy Quartz Mine, Lot No. 44; and

(*c*) Plaintiff must establish its title and right to the ores in dispute in this cause, if at all, by showing that in law as well as in fact, said ores constituted part of the Pioneer Quartz Mine, Lot No. 48, set up in the complaint herein, and not by showing that defendant has no title nor right to said ores by reason of its ownership of the Kennedy Quartz Mine; and

(d) Defendant claims title to the ores in dispute in this cause by reason of its ownership of Silva Quartz Mine, Lot No. 86, and not by reason of its ownership of Kennedy Quartz Mine, Lot No. 44.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

Fifteenth. All and singular each and every the facts stated in paragraph VI of said agreed statement, showing among other matters and things, that on January 13, 1871, the Pioneer Gold and Silver Mining Company applied for a patent to the Pioneer Quartz Mine, Lot No. 48, and that a diagram of said Pioneer Quartz Mine was posted in the U. S. Land Office at Sacramento, California, and on said Pioneer Mine;

Sixteenth. All and singular each and every the facts stated in paragraph VII of said agreed statement, showing among other matters and things, that there was a certain surface conflict as to area claimed by said Kennedy Mining Company and adversely claimed by Pioneer Gold and Silver Mining Company, and that on January 13, 1871, the Register and Receiver of the Land Office at Sacramento, California, made and entered an order setting forth said surface conflict, and suspending said patent proceedings of said Kennedy Mining Company pending an adjustment of said surface conflict;

Seventeenth. All and singular each and every the facts stated in paragraph VIII of said agreed statement, show-

ing among other matters and things, that on February 20, 1871, said Kennedy Mining Company and said Pioneer Gold and Silver Mining Company entered into an agreement in writing adjusting their said conflict as to said surface area, and that said agreement was filed in the U. S. Land Office at Sacramento, California, said agreement being set forth in *haec verba* in said paragraph VIII;

Eighteenth. All and singular each and every the facts set forth in paragraph XIII of said agreed statement, showing among other matters and things, that on June 16, 1871, the U. S. Surveyor General for California instructed said William L. McKim to make patent survey of said Pioneer Quartz Mine;

Nineteenth. All and singular each and every the facts stated in paragraph XIV of said agreed statement, showing among other matters and things, that said McKim completed his patent survey of said Pioneer Quartz Mine on September 1, 1871, and thereupon returned said survey to the U. S. Surveyor General's Office, and that on December 21, 1871, said Surveyor General approved said survey, the aforesaid return of such survey of said Pioneer Quartz Mine being set forth in *haec verba* in said paragraph XIV of said agreed statement;

Twentieth. All and singular each and every the facts set forth in paragraph XV of said agreed statement, showing among other matters and things, that on February 23, 1872, said Pioneer Gold and Silver Mining Company entered and paid for said Pioneer Quartz Mine as so surveyed by said William L. McKim, and that the Re-

ceiver of said U. S. Land Office thereupon issued his duplicate receipt evidencing such entry and payment.

Defendant bases its aforesaid objections to the admission as evidence herein of the facts set forth in said paragraphs VI, VII, VIII, XIV and XV of said agreed statement, upon the following grounds, to-wit:

(*a*) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause; and

(*b*) All and singular each and every the facts so objected to are incompetent as evidence to limit or enlarge or explain or anywise to control or modify or affect the terms or provisions or legal effect of the patent issued to said Pioneer Gold and Silver Mining Company for said Pioneer Quartz Mine, Lot No. 48, on August 12, 1872, as shown by paragraph XVI of said agreed statement; and

(*c*) All and singular each and every the facts so objected to relate only to the surface area to be embraced within said Pioneer Quartz Mine, Lot No. 48, and in no wise relate to any extra lateral right claimed as attaching to said Pioneer Quartz Mine, Lot No. 48, nor to any right or interest in any part of any lode or lodes lying outside the vertical boundaries of said Lot No. 48; and

(*d*) The agreement as to the common boundary line between said Kennedy Quartz Mine and said Pioneer Quartz Mine set out in paragraph VIII of said agreed statement, is not recited nor referred to in said patent to said Pioneer Quartz Mine, nor was said agreement ever recorded in the office of the County Recorder of the

County of Amador, State of California, in which said Pioneer Quartz Mine is situate, nor is it alleged in the complaint herein that this defendant was a party to said agreement, nor that this defendant ever had any notice or knowledge of the existence of the same at the time it acquired its title to said Kennedy Quartz Mine, Lot No. 44, or at the time when it acquired its title to said Silva Quartz Mine, Lot No. 86, the patenting of which is shown by the facts set forth in paragraph XXVIII of said agreed statement.

DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

Twenty-first. All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U. S. Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pioneer Gold and Silver Mining Company the Pioneer Quartz Mine, Lot No. 48, as the same is described in said letters patent, a copy of which is set forth in *hacc verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;

Twenty-second. All and singular each and every the facts set forth in paragraph XXVI of said agreed state-

ment, showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof.

Defendant bases its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid latters patent to said Pioneer Quartz Mine and the facts, matters and things therein recited, upon the following grounds, to-wit:

(a) All and singular each and every the facts so objected to, including all and singular each and every the said patent to said Pioneer Quartz Mine, Lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: ALTHOUGH IT IS TRUE that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the "Pioneer Vein," and that the apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant

from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that, as shown by said Pioneer patent and by the complaint herein and by reference to said "Exhibit A," the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle towards the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being North Eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII,

XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said vertical east side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the Development of the Mining Resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz M'ne, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48 should or could attach to said Lot No. 48

and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48, AND THEREFORE the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

(*b*) All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is

necessary to follow said Pioneer vein on its dip away from said Lot No. 48, and in the direction of said divergence to points distant more than nine hundred feet from said Lot No. 48,—THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States" under which said Pioneer patent was issued, and especially because of the provisions of sections two (2) and three (3) of said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48 as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

(*c*) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

(*d*) The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this, said patent purports to grant only

$1589^{94}/_{100}$ linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to $1589.^{94}/_{100}$ linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that, even though the grant of $1589^{94}/_{100}$ linear feet of said Pioneer vein mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

(c) If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said Lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of $1589^{91}/_{100}$ linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein, said south end line of said Lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line of said Lot No. 48, to-wit, from the north end of said vein, parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48, which is definable by reference to the boundaries of said Lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

Twenty-third. All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1450, 1550, 1650 and 1750 levels south of a vertical plane drawn down through the north end line of said Lot No. 48 extended indefinitely in its own direction North seventy-four (74) degrees and fifty-one (51) minutes East, and that between October 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said Pioneer vein southerly from said vertical plane but within the vertical boundaries of said Silva Quartz Mine, and that the gross value of said 2,604 tons of ore was $62,218.45, and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;

Twenty-fourth. All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B′.

Defendant bases its aforesaid objections to the admission as evidence herein of such facts set forth in said par-

agraphs XXIII and XXIV of said agreed statement, upon the following grounds, to-wit:

(a) All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: ALTHOUGH IT IS TRUE that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 throughout the entire length of said Lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that, as shown by said Pioneer patent

and by the complaint herein and by reference to said "Exhibit A," the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said east vertical side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by reference to said paragraph XXIII and to said "Exhibit A"

all of said ores were extracted outside of and far easterly from said Lot No. 48 and at points where vertical planes drawn down through the end lines of said Lot No. 48 extended in their own directions respectively, are distant from each other more than 1900 feet, AND IT IS ALSO TRUE that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the development of the mining resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz Mine, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48, should or could attach to said Pioneer Quartz Mine, and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any

extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said Lot No. 48, AND THEREFORE the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; AND THEREFORE said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, AND THEREFORE did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to said plaintiff; and

(*b*) All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said Lot No. 48 and within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the sub-

stance contained within the vertical boundaries of said Lot No. 86, and DEFENDANT further under said statutes and legislation of the United States, SPECIALLY SETS UP AND CLAIMS immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said Lot No. 86 or any thereof and DEFENDANT FURTHER SPECIALLY SETS UP AND CLAIMS immunity from and against the claims of plaintiff to said 2,604 tons of ore and to the substance contained within the vertical boundaries of said Lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said Lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said Lot No. 48. THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States," under which the U. S. patent to said Lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of

said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said Lot No. 86, or any thereof; and

(c) All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

(d) The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to $1589^{94}/_{100}$ linear feet of said Pioneer Vein with the exclusive right to said $1589^{94}/_{100}$ linear feet of said vein throughout its entire depth although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said $1589^{94}/_{100}$ linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular $1589^{94}/_{100}$ linear feet of said Pioneer Vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint

whether it is the intention of plaintiff to claim that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer Vein lying parallel with and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of $1589^{94}/_{100}$ linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

(c) If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said Lot No. 48, such part so defined must be either (1) that certain segment of $1589^{94}/_{100}$ linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said complaint, said south end line of said Lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line

of said Lot No. 48, to-wit, from the north end of said vein, parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48 which is definable by reference to the boundaries of said Lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint.

And THIS DEFENDANT SPECIALLY SETS UP AND CLAIMS that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by plaintiff to the ores in question by reason of its ownership of the Pioneer Quartz Mine, Lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva Quartz Mine, Lot No. 86, is involved: First, the construction of the Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States," un-

der the provisions of which plaintiff acquired its title to said Lot No. 48; and, second, the construction of Chapter Six of Title Thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said Lot No. 86.

And all and singular each and every of such objections are so SPECIALLY SET UP AND CLAIMED BY DEFENDANT so as to apprise the court that the Federal Questions so involved are presented for its consideration and decision. John M. Wright, Byron Waters, John J. Snyder, Attorneys for Defendant.

[Endorsed]: No. 1408. In the Superior Court of the County of Calaveras, State of California. Argonaut Mining Company (a corporation) Plaintiff vs. Kennedy Mining and Milling Company (a corporation) Defendant. Defendant's objections to certain facts in the agreed statement. Service of the within by delivery of a copy thereof admitted this 11th day of October, 1898.

Lindley & Eickhoff, W. J. McGee, F. J. Solinsky, Attorneys for Plaintiff.

Filed this 12th day of October, 1898. A. L. Wyllie, Clerk. By W. S. Coulter, Deputy Clerk.

No. 256.
Sup. Ct. Bk. of Garber for C. C.

Office Supreme Court U.S.
FILED
MAY 3 1902
JAMES H. MCKENNEY, Clerk.

Filed May 3, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 256.

THE KENNEDY MINING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

v.

THE ARGONAUT MINING COMPANY.

MEMORANDUM OF CITATIONS ON BEHALF OF PLAINTIFF IN ERROR AT ORAL ARGUMENT.

JOHN GARBER,
Counsel for Plaintiff in Error.

(18,060.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3031

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Supreme Court of the United States

OCTOBER TERM, 1901.

No. 256.

THE KENNEDY MINING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

v.

THE ARGONAUT MINING COMPANY.

MEMORANDUM OF CITATIONS ON BEHALF OF PLAINTIFF IN ERROR AT ORAL ARGUMENT.

I.

To the point of Federal question and jurisdiction:

The transcript and briefs constituting the record on file in this court in—

Clark *v.* Fitzgerald, 171 U. S., 92.

S. C., below—

Fitzgerald *v.* Clark, 42 Pacific R., 273.

Also—

King *v.* Amy-Silversmith, 152 U. S., 228.

Also the following quotation:

"The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws as we construe them grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute, section 2319, declares 'the lands' in which valuable mineral deposits are found, to be open to occupation and purchase, and section 2325 provides that 'a patent for any land claimed and located for valuable deposits may be obtained in the following manner:'

"These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the 'veins, lodes and ledges' is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In Parrott Silver & Copper Co. *v.* Heinze *et al.*, 64 Pac. Rep., 326, the supreme court of Montana held in substance that the owner of a mining claim is *prima facie* the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course."

Read from opinion of Judge Gilbert for circuit court of appeals, ninth circuit, in St. Louis, &c., Co. *v.* Montana, &c., Co., not yet reported, but copy lodged with clerk of this court and printed as an appendix hereto.

II.

To the point that although end lines are not mentioned in terms in statute of 1866, they and their parallelism are implicit therein, and that the expression thereof in the statute of 1872 is retroactive:

Opinion of Justice Field in Eureka case, 4 Sawyer, 302.

Opinion of Judge Temple in transcript.

Opinion of Justices Brewer and McKenna in Del Monte and Providence, 171 U. S., 55 and 293.

Transcript and briefs in this court in the case of Lakin *v.* Roberts, October term, 1893, vol. 22.

III.

To the point of election and effect of taking patent according to provisions of statute of 1872:

New Dunderberg *v.* Old, 79 Fed., 598.

Respectfully,

JOHN GARBER,

Counsel for Plaintiff in Error.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, *Appellants*,
v.
THE MONTANA MINING COMPANY, LIMITED, *Appellee.*
} No. 714.

Appeal from the United States circuit court for the district of Montana.

Toole & Bach for the appellants; W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for the appellee.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court:

The St. Louis Mining and Milling Company is the owner of the St. Louis Lode mining claim and the Montana Mining Company, Limited, the appellee, is the owner of the Nine Hour Lode mining claim which adjoins the St. Louis claim on the east. The appellants were proceeding to drift a tunnel 260 feet underground horizontally from the St. Louis claim eastward and into the Nine Hour claim for the purpose of reaching and mining a lode which had its apex in the St. Louis claim and which they had the right to pursue on its downward course as it passed with its dip to the eastward out of their side line into the Nine Hour claim. It was stipulated that the tunnel, if projected in the course in which it was being drifted, would reach the vein or lode which had its apex within the St. Louis claim, and that in

the course of its progress there would be encountered no other vein, lode or ledge. At the suit of the owner of the Nine Hour claim the circuit court enjoined the appellants from proceeding further with said tunnel; from that decree the present appeal is taken.

The case involves the interesting question whether the owner of a mining claim who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim is confined in his right to operations within or upon the vein itself and is without authority to otherwise enter the adjoining claim. The appellants contend that a patent for a mining claim by its terms conveys only the surface of the claim, together with all veins, lodes, or ledges having their tops or apices within the surface boundaries thereof, and that the granting words of the appellee's patent circumscribe the right of the grantee thereof to the precise estate granted, and that since the mining law confers the general right to explore and purchase the mineral lands of the United States the appellants in this instance have the right to explore within the Nine Hour claim and thereby to reach their own property, so long as they interfere with no right granted to the owners of the latter claim. It is true that the statute, section 2322, and the patent thereupon issued, confers upon the locators of mining claims in terms only "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations," and that the statute further specifies that such locators, notwithstanding their extralateral rights, shall have no authority to enter upon the surface of a claim owned or possessed by another. But the appellants must find in the same

statute the full measure of their own right. What are the rights that are given by the patent to the owners of the St. Louis claim? They are given the right of possession of the surface and of everything within their own claim except the veins or lodes therein which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims, so as to confer extralateral rights. This is their right and no more. There is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether upon or below the surface. The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws, as we construe them, grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute, section 2319, declares "the lands" in which valuable mineral deposits are found to be open to occupation and purchase, and section 2325 provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner:" These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the "veins, lodes and ledges" is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes and ledges

extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In Parrot Silver & Copper Co. *v.* Heinze *et al.*, 64 Pac. Rep., 326, the supreme court of Montana held in substance that the owner of a mining claim is *prima facie* the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: "Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant." Of similar import is State *v.* District Court, 65 Pac. Rep., 1020. In Doe *v.* Mining Co., 54 Fed., 935, Judge Ross said: "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law." In Consolidated Wyoming G. M. Co. *v.* Champion Min. Co., 63 Fed., 540, Judge Hawley said: "Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim." We find no error in the decree of the circuit court. The decree is affirmed.

(Endorsed:) Opinion. Filed March 10, 1902. F. D. Monckton, clerk.

Supreme Court of the United States

OCTOBER TERM, 1902.

Nos. 49 and 58.

THE KENNEDY MINING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

v.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Opening Argument of Mr. John Garber for Plaintiff in Error.

This cause came on for reargument Wednesday, December 10, 1902.

Mr. GARBER: If the court please, this is an action of trespass instituted in the State courts of California by The Argonaut Mining Company, the defendant in error here, against The Kennedy Mining and Milling Company for the value of certain valuable ores extracted by the plaintiff in error from the Silva Quartz Mine location, a patented location under

the laws of Congress owned by the plaintiff in error, the plaintiff in error claiming the right to mine all the minerals contained in it by virtue of that patent. The ores were taken beneath the surface, I will say in round numbers, two thousand feet vertically from the surface.

The claim of the defendant in error (plaintiff below) was based upon a patent of the United States, also issued under the Revised Statutes in regard to lode mining claims, for what is marked here on the map as the Pioneer Argonaut quartz mining claim. That is for a claim nearly in the shape of a parallelogram, having the end lines, as your honors will see, diverging in the direction of the dip of the lode; not parallel, but diverging to such an extent—some fourteen degrees, I think—that when the station from which these ores were extracted by the plaintiff in error was reached, instead of some 1,589 feet on the course of the lode, as delineated on and contained within the surface of the patent of the plaintiff, there would have been some four hundred feet additional between the two end lines of the patented location at the place where the ores were extracted.

Mr. Justice BREWER: What is the name of this mine—the Silva?

Mr. GARBER: The Kennedy.

Mr. Justice BREWER: And the Kennedy Company claimed that, too?

Mr. GARBER: Yes, your honor; but I was purposely omitting that for the present.

Mr. Justice BREWER: Do you claim any right under this?

Mr. GARBER: We claim under the Silva patent.

Mr. Justice BREWER: Then the question is whether the

Pioneer claim there, bounded by that line, comes down in such a way as would cut the Silva claim in two?

Mr. GARBER: The claim is that the lode whose apex is found in the Pioneer on its downward dip will be found underneath the surface of the Silva location.

Mr. Justice BREWER: A part of it.

Mr. GARBER: That the Pioneer cuts the Silva in its downward course; and it is a conceded fact in the case that the ores were taken from the identical lode which has its apex in the Pioneer location. The question, then, is whether by virtue of this patent and under the law of Congress the plaintiff below acquired extralateral rights on his claim, which we deny by reason of the non-parallelism of the lines.

Mr. Justice BREWER: That is the question in the case?

Mr. GARBER: That is the question in the case, as I understand it.

Upon that point in the court below the defendant in error made two claims, so far as this particular point is concerned. It claimed that under the construction or operation of the laws of Congress, its claim having been located under the law of 1866, and prior to the passage of the law of 1872, as counsel says repeatedly in his brief here and was said below, that the claim originated, matured, and was perfected under the law of 1866. We concede that it was located and worked under the law of 1866. We also concede, as he claims, that a month or two prior to the passage of the law of 1872 they had already made a claim for a patent for this claim, the Pioneer claim, and that application had passed to entry and payment prior to the enactment of the law of 1872. His further claim is that by reason of that entry prior

to the law of 1872 he stood to all intents and purposes just as if he had already obtained the patent before the passage of the law of 1872, on the principle that a perfected application, perfected by entry and payment, is the equivalent in law of a patent issued.

Mr. Justice BREWER: May I make this suggestion? that one of the questions that have troubled the court was the question of jurisdiction. The plaintiff below claims certain rights under the laws of Congress, extralateral rights, and you deny them.

Mr. GARBER: We claim rights, as we put it, under the Silva patent.

Mr. Justice BREWER: You do not claim any extralateral rights?

Mr. GARBER: No, your honor.

Mr. Justice BREWER: You simply deny the plaintiff's claim.

Mr. GARBER: We claim that by virtue of the laws of Congress and the Silva patent we obtained a grant to the whole of the ore that is under that surface, subject only to the rights of one who might have an extralateral right by parallelism.

Mr. Justice BREWER: Similar to the owner of an agricultural patent, who has all above and below the surface. Then the question, or at least one of the questions, that we have been considering is whether, when you simply deny the right of the plaintiff to extralateral rights, you have presented, under section 709 of the Revised Statutes, a Federal question upon which this court can take jurisdiction?

Mr. GARBER: That is one question.

Mr. Justice BREWER: I wanted to understand your position.

Mr. Garber: If the court prefers that I should, I will address myself to that point first.

Mr. Justice Brewer: Follow your own line of argument.

Mr. Garber: So far as that question is concerned, then, we claim that it is not a mere denial on our part of a claim made by the plaintiff under the act of Congress, but it is an affirmative claim on our part of certain rights granted to us under the act of Congress by the Silva patent, to wit, we claim, and I read some authorities here to that effect at the former hearing, that by that act of Congress and by that Silva patent we obtained title not only to the lodes whose top or apex is to be found within the Silva surface, but title to all the ores within the surface of the claim, regardless of the fact whether the apex was inside or outside their boundaries—the right to all the ores to be found within this surface extending down vertically into the earth, subject only to a possible right to be shown by somebody outside, like the Pioneer.

Mr. Justice Brewer: Is not that true of every patent that the Congress of the United States makes to lands throughout the country?

Mr. Garber: Perhaps so. Then what? Suppose a man has an agricultural patent, that his contention is that under the law of Congress he owns everything in that land, from the surface of the earth to the center, and then suppose that some one else claims, under act of Congress, an easement in that land, which easement is denied upon the proper construction of the act of Congress or otherwise, is not that claiming a right, title, or immunity under the act of Congress if the claim under the agricultural patent is denied?

Our claim is that we have everything in that land; that

we have an absolute right to every pound of ore within the boundaries of that land, with a single exception—that it may be entered upon by some one who proves that he has an apex outside and has parallel end lines which give him the title to the whole lode. Am I not claiming a right, title, and immunity under the act of Congress, then? This is my right. It is given to me, how? By the act of Congress, subject only to this other claim. If the other party comes and makes his claim, and I deny that under the law of Congress he has that claim, is not my right, which I claim under the law of Congress, denied by the decision construing this right contrary to my contention? I claim it all. It is mine, I say, by the act of Congress. I say that, properly construed, this act of Congress has given me the absolute right to that, except as against the man with parallel end lines.

But suppose the court says, No, you have not that right, even as against the man with non-parallel end lines. You have no right as against the man who has diverging end lines. That is a different right from that given by the law of Congress. That takes away from me something which belonged to me by virtue of my grant. It qualifies my grant, and not only affirmatively gives to the other man an unwarranted grant, but the very decision allowing the extralateral rights with non-parallel lines, which were not given by the act of Congress, *ipso facto*, and necessarily detracts from, takes away from, my right and misconstrues the act of Congress upon which my right and claim are based.

Mr. Justice WHITE: Your claim amounts simply to this: For instance, suppose you received an agricultural patent

and coal was found under that land and somebody came along and took out coal.

Mr. GARBER: There might be no Federal question there.

Mr. Justice WHITE: Why not?

Mr. GARBER: That might not depend upon the construction of any law of Congress.

Mr. Justice WHITE: It would depend upon the construction of the act of Congress giving you your patent.

Mr. GARBER: The law of Congress giving me my patent?

Mr. Justice WHITE: I mean your mineral. Suppose you got an ordinary patent to land, and that subsequently coal were discovered under that land, and that somebody came upon your land and began to take out coal.

Mr. GARBER: It might be a mere trespass——

Mr. Justice WHITE: I do not know whether it would be a mere trespass or not. You say the coal did not pass under the patent. Would you not be asserting a right under the act of Congress?

Mr. GARBER: I would be asserting my right under the act of Congress as the foundation of my title, but, if your your honor please, I think there may be a difference. In the case your honor puts, where I simply claim under an ordinary act of Congress and somebody else makes claim against me, the decision of the court in favor of his right as against mine might not construe my right under the act of Congress at all, in so far as my right depends upon the construction of that act of Congress.

Mr. Justice MCKENNA: Would it not involve the act of Congress?

Mr. GARBER: If that controversy arose you would have here a Federal question decided against me.

Mr. Justice McKenna: That was Mr. Justice White's question.

Mr. Garber: I did not understand the Justice.

What I say is this: This law grants me a certain thing. If the decision takes a certain thing out of that grant, then the proper construction of the question of the exception certainly qualifies my claim under the act of Congress. That is my claim.

I contend, further, that this exact point has been decided by this court. I remember that on the former hearing the case of King *v.* Amy-Silversmith (152 U. S., 228) was cited, where the identical question was presented here on writ of error to the State court. In that King *v.* Amy-Silversmith case the question was whether the Federal laws in regard to mining claims had cut off the extralateral right as against the party claiming to go under the surface, and the decision was against the claimant of the surface location. He took out a writ of error. That writ of error was sustained here. I say in that case the claim was identical with the claim we are making here. The party claiming the surface in that King *v.* Amy-Silversmith case claimed everything under the grant, with the exception, as we do here, of those who, having the right to the apex, followed the apex with proper extralateral pursuit. The apex in that case was in the other claim, and it was followed down under the surface of the plaintiff in error in that case. The case came to this court on a writ of error; this court took jurisdiction of the case and decided the case in an elaborate opinion.

Another case was that of Clark *v.* Fitzgerald (171 U. S., 92), decided at the same time with the Del Monte case. In that case the same question arose. The party claiming the

surface grant and the right to the ore by reason of his ownership of the surface patent was defeated by another party who burrowed under him, claiming, as is claimed here, the extralateral right. The plaintiff in error contended that under a proper construction of the act of Congress there were no extralateral rights because of the position of side and end lines. A motion was made to dismiss that writ of error. That motion was argued, and this court, instead of dismissing the writ of error, took jurisdiction and affirmed the judgment of the court below.

There are numberless other cases in this court, it seems to me, which tend in the same direction and lead to the same conclusion.

It seems to me the Wells-Fargo case was a parallel case, where, under a law of Congress, the express companies were required to stamp certain receipts. They made the claim that they had the right to charge the amount of those stamps upon their customers. That claim was denied, and they brought their writ of error here. This court decided that it had jurisdiction under that writ of error, and reversed the case. Wells-Fargo had no more a claim under an act of Congress than we have here, and not so much.

But to go back. Here we claim a certain thing under and by virtue of the mining statutes. We claim that by a proper construction of these statutes that is ours; that belongs to us. The court below decides: No; you are wrong. The legislation of Congress did not give you this thing at all. You have no right to it. We say we have a right to it, except in a certain contingency. They say: No; you have not a right to it, even though that contingency does not happen. Surely, your honors, if an act of Congress

gives me a certain right with a certain specified exception, and if I set up that right in the court below, and it is denied to me, my claim of immunity and right under the law of Congress is certainly denied just as much as if the other party were not making the claim of the nature that the Pioneer makes here. What difference does it make here that the Pioneer Company says, "We are claiming under the law of Congress," when the very moment that claim is sustained there is taken from us a certain thing which we say, under a correct construction of the act of Congress, was given to us by that act of Congress, viz., the right to hold that until some one comes with a proper extralateral claim.

Mr. Chief Justice FULLER: I should have asked counsel before this time if there is any objection on their part to Mr. Justice Harlan participating in this case. He happens to be absent, but we are expecting him.

[No objection was made by counsel on either side.]

Mr. GARBER: If your honors please, at a later stage I may have something more to say on this point. I did not anticipate that this question would be raised, and I may recur to it. By permission I will now go on with the merits of the case.

Mr. Chief Justice FULLER: Certainly.

Mr. GARBER: To recur to that: The plaintiff, as I said, made two claims in the court below. The claim upon which he mainly insisted, and upon which he chiefly rested his case, was this: That, under the act of Congress, as his rights originated under the law of 1866, no matter how flaring the end lines were——

Mr. Justice WHITE: Mr. Garber, as you stand I cannot

see those lines on the map. As I understand, you are pointing on that map to the lines that flare; get wider apart?

Mr. GARBER: Yes, your honor.

Mr. Justice WHITE: I could not see; that is why I asked.

Mr. GARBER: These lines of the Pioneer flare in the direction of the dip of the vein—can your honor see?

Mr. Justice WHITE: Yes; I see perfectly.

Mr. GARBER: If this survey had been made, as we say, according to the act of Congress, the end lines would have preserved the same length of vein, no matter how far apart they extended; but by flaring they follow in the direction of the dip, and consequently the deeper they go the more ground they get.

Mr. Justice WHITE: I am much obliged.

Mr. GARBER: Now, I say their claim was that their rights having originated under the law of 1866, it mattered not how divergent these lines were, they were entitled by the express language of the law of 1872 to all the ore to be found in that vein from its beginning down into the bowels of the earth, provided they kept within those flaring end lines. That was their claim.

An alternative claim of theirs, put in in view of the fact that the other might be decided against them, was that in any event, if they were not entitled to that right, they were entitled to have two perpendicular planes drawn down through the two points on the surface of their patented claim where the lode crosses it on the surface—lines perpendicular to the course of the vein—and that would be the limit of their extralateral rights. Now, the court below decided in favor of the plaintiff in error on the first contention.

Mr. Justice WHITE: In other words, as I understand you—pardon me for questioning you——

Mr. GARBER: Certainly.

Mr. Justice WHITE: They claim that they were entitled to the flaring end lines because their rights were governed by the act of 1866.

Mr. GARBER: Yes, sir.

Mr. Justice WHITE: But they further claim that if that were not so, then they had in effect a right to conform their lines to the act of 1872?

Mr. GARBER: No, sir; not exactly, for this reason: It is conceded that the act of 1872 allowed no end lines except those marked upon the surface of the patent. So they did not claim to conform to the act of 1872, but they claimed that if they had made a mistake and flared their end lines so that they could not claim to the full extent, they could go back and draw a perpendicular plane through the vein at the extremities of the vein on the surface and at right angles to the general course of the vein. Your honor will understand that in these veins in the earth the dip is always at right angles to the strike. What they call the strike is the length along the course of the vein, the dip being perpendicular to that. What they claimed was that at the least they should be entitled to draw perpendicular lines right through, cutting this vein at right angles to its course.

Mr. Justice MCKENNA: To which act did they assign that right?

Mr. GARBER: They based that right upon the decision of Mr. Justice Field in the Eureka-Richmond case, wherein he held that, prior to, and I may say even under, the act of 1866, miners were entitled to draw lines perpendicular to

the course of the vein at the extremities of the vein on the surface. If your honor recalls—as of course you do—that was still the opinion of some of the members of this court at the time the case of Iron Silver Mining Company v. Elgin Company (118 U. S., 186) was decided, wherein Chief Justice Waite and Mr. Justice Bradley dissented from the decision establishing that the flaring end lines under the law of 1872 absolutely controlled—dissented on the ground that they thought, even at that late day, that the end lines on the surface were not the controlling factors, but that the lines should be drawn perpendicular to the course of the vein at the extremities of the vein on the surface.

Mr. LINDLEY: That was under the act of 1872.

Mr. GARBER: That was under the act of 1872. And even under that act it was so contended by the two dissenting judges in the Elgin case; but Mr. Lindley contended that at any rate, under the act of 1866, if he was not entitled by virtue of the provisions of the act of 1872, which he contended applied back to the act of 1866, or to the patent under the act of 1866, he was at any rate entitled to have the perpendicular lines drawn down so as to take in that segment of the vein.

The first of those propositions was decided against the plaintiff in error in the court below, and Mr. Justice Temple, in delivering the opinion of the court, quoted largely from the opinion of Mr. Justice Field in the Eureka-Richmond case, where Justice Field made an elaborate argument to this purport: that there never had been a time since the passage of the act of 1866; that before that there never had been a time in the history of mining in the United States, when there could have been such a doctrine as that a party

could claim under ground a greater number of feet in a lode claim than he was entitled to by the law on the surface of the ground. He said that any such construction as that would do absolute and irretrievable violence to the provisions of the law that the claim should be confined to a certain number of feet along the course of the lode and to any depth as you went down from the surface. He said that this limitation upon the length of the claim and the quantity of ground that may be thus located or held was the controlling and paramount feature of the whole system of mining law. He said then that the lines must be drawn so as to give no more under the ground than on the surface of the ground. Upon that Mr. Justice Temple, in the supreme court of California, decided in this case that the first contention of the defendant in error was entirely—and obviously, he said,—inadmissible; that no such construction could be allowed, because it would nullify the whole policy and purpose of the law, and would lead, as Justice Field said in the Eureka-Richmond case, to a system where one man might create for himself a monopoly of the whole vein and oust all his neighbors and take the whole ground, regardless of the limitation upon quantity imposed by the law under which he claimed.

But Judge Temple further said that, notwithstanding that, although he could not take to the full extent given by the end lines, he was entitled, his claim having arisen under the act of 1866, to take what would be found within perpendicular lines drawn to the extremities on the surface, so far as it was also contained within these flaring end lines. In other words, he did not give them all that would be found within the two perpendicular planes thus drawn, nor did he

give them all that would be between the flaring end lines contained in the patent; but he gave them just what would be contained in both of them—in this particular case resulting in the converging lines delineated in the patent here.

Mr. LINDLEY: In other words, on that line of contention, if we had been successful we would have taken more than we claim?

Mr. GARBER: And more than you got.

Now, in further answer to Mr. Justice McKenna, one reason that Judge Temple gave for that decision was this: That the law leans against forfeitures, and that it was not to be supposed, without some compelling reason, that Congress, in enacting the statute of 1872, intended to derogate in any way from the rights acquired under the act of 1866; and that, according to the opinions of Justice Field and in certain other cases in the United States courts from which he quoted, as it had been intimated—he did not say decided, because, of course, they never did so decide—it had been intimated that there might be extralateral rights to a patent issued under and in pursuance of the law of 1866, even though the end lines were not parallel; that he must assume that that was the law, and that these extralateral rights must be allowed to prevail so far as they could consistently with the limitations of the act of 1872, because, he said, the law of 1872, instead of adding to the rights under the act of 1866, only put further limitations upon those rights; and it was within those limitations that the old rule or supposed rule that right-angled lines should be held to prevail, and he held that they did prevail in this case, and consequently affirmed the judgment below.

Mr. Justice PECKHAM: How do you get converging lines there?

Mr. GARBER: Take the outside end lines, double lines, and your honor will see that the right-angle line would come down here outside from the end lines. There is that end line, and here is the perpendicular. That leaves a triangle there. Here is a perpendicular line here, and here is an end line here, leaving that triangle there.

Mr. Justice PECKHAM: The end line you speak of comes within that?

Mr. GARBER: The perpendicular lines would lie within these lines. These two perpendicular lines and the other end lines would necessarily tend to converge as they went down.

There the case stands upon the merits.

Mr. Justice MCKENNA: That decision would not permit them to go outside of the surface boundaries.

Mr. GARBER: Not outside of the surface boundaries nor outside the vertical boundaries, because, he said, if you allowed them to go outside the perpendicular boundaries you necessarily destroyed the limitation of quantity on the vein, because as you go down you get more and more and he would not allow that. Following Mr. Justice Field, he said it was an absolute rule that the limitation of quantity is a controlling limitation in the policy of these laws; that you cannot get any more below than you have on the surface, and, as a necessary corollary, in order to avoid getting any more in depth than you have on the surface you cannot make the end lines divergent. You must have parallel end lines. There is no other way to do it.

So that is the way the case stands now. We claim that

the supreme court of California was entirely correct in holding that the party could not claim under his diverging end lines, in so far as that would give more ground underneath than the party owns on the surface.

We claim that he was wrong in setting up a further limitation in allowing him to take within the lines drawn perpendicular to the course of the vein, because we say that it has been absolutely and conclusively settled by the decisions of this court, so that it is not now really open to debate, that there can be but one set of end lines under any mining patent, whether issued under the law of 1872 or under the law of 1866.

To illustrate that: In this mine there may be found tomorrow a number of ancillary veins separate and distinct from the principal vein in controversy; you may find as many veins there as you can imagine, and they may run in as many different directions as you see fit to imagine. Mr. Justice Temple's view was that there would be but one thing to do, and that would be to take each separate case as the controversy arose and draw your perpendicular end lines from the extremities of that ancillary vein. There would be no other way to get any limitation upon it. The only way to get any limitation upon the principal vein, which must have a limitation, is by drawing lines perpendicular to the course of this vein. If we have another vein here with a different course, and still another vein with a different course, the inevitable result must be that you must draw as many different sets of end lines as you have different veins within the limits of the patent, with different courses to the principal vein.

I say that that of itself shows that that decision cannot

stand without overruling the whole line of authorities which have been laid down by this court in that respect.

At 4.28 p. m. the court adjourned till 12 m. tomorrow.

THURSDAY, *December* 11, 1902.

Mr. Chief Justice FULLER: Proceed, Mr. Garber.

Mr. GARBER: May it please the court, I was speaking yesterday more particularly with reference to the bearing of the statute of 1866 upon this case. I wish now to advert more particularly to the act of 1872, premising that in our contention all of these acts of Congress (the act of 1866, the act of 1870, and the act of 1872) constitute really but one statutory disposition, by the Congress of the United States, of the soil of the United States in respect of mineral lands.

Now, as I understand, it was one of the contentions of the defendant in error below, and is one of his contentions here, that if by a proper construction of the act of 1866 he acquired no extralateral rights, but was confined to his surface grant and all thereunder contained, still, by virtue of the provisions of the act of 1872, all limitations and restrictions upon his extralateral rights were removed, and that, by virtue of the act of 1872, if not before, he acquired full and complete extralateral rights, by the language of the act of 1872, to everything contained within planes drawn downward through his end lines, as delineated upon the surface of his patent.

It was also a counter-contention on the part of the plaintiff in error in that regard that, even if by the provisions of the act of 1866 extralateral rights accrued to the patentee—to the plaintiff below—that by reason of the passage of the act of 1872 its rights were so qualified and so limited as to

entirely abrogate all extralateral rights, and that, in addition to the direct operation of the act of 1872 in that respect, by the patentee's own voluntary action and election in applying for and accepting a patent under the provisions of the law of 1872, he renounced all rights which he might have had under the act of 1866 inconsistent with or different from those given by the act of 1872, and stood, in effect, just as he would have stood had his location beeen made instead of the patent having been taken under the act of 1872—as if, in fact, the statute of 1866 had never existed, but the statute of 1872 had been the statute of 1866.

Now, we base that contention upon these considerations: The act of 1872 made a series of provisions, all contained in one section, as to the location of claims and as to the rights which should be acquired by locators. I will not pretend to quote accurately the language of the statute, and if I do not give it correctly, in substance, your honors can correct me when you come to read it. It was, in substance, this:

All locations heretofore made shall be governed in length along the claim by the local usages, customs, and the law in force at the date of the passage of this act, May 10, 1872; that all claims hereafter located (that is, after May 10, 1872) may equal, but shall not exceed, fifteen hundred feet in length along the claim, but no location shall be made until a discovery of ore within the surface location or within the limits of the location is made.

This section, having first spoken of the claims theretofore located and provided for claims thereafter to be located, speaks generally of all claims, whether theretofore located or hereafter to be located, and says the width of *no* claim—not any claim hereafter located, but the width of *no* claim

shall exceed three hundred feet from the middle of the vein on the surface; nor shall any claim be limited to less than twenty-five feet by local regulation, unless for a specified reason it be necessary to do so, and that the end lines of all claims shall be parallel with each other.

Now, we contend that the provision as to the width of claims and the provision as to the parallelism of the lines of location apply equally to claims located before the passage of the act as to claims located after the passage of the act. We contend for it upon the plain and manifest construction of the language of the statute, the collocation of words and phrases, the framework of the statute.

We contend for it further because of the reason that such must be the presumed intention of Congress in enacting the statute.

And we contend for it still further because we say that by a deliberate and solemn judgment of this tribunal, the final arbiter of all these questions, that point has been conclusively, after full argument, settled and determined in regard to the provisions as to the width of claims.

In the case of Lakin *v.* Dolly—sometimes referred to as Lakin *v.* Roberts, I believe—in the circuit court of the United States for the ninth district, that exact question was presented. There was a location made prior to the act of 1866. The patent was also, I believe, applied for prior to the act of 1872, but granted after the passage of the act of 1872. The application was made long prior to the passage of the act of 1872, but the patent was granted after the passage of that act.

Your honors will observe that prior to the act of 1872 the only limitation upon the width of claims was that they should

be governed by the local rules, usages, and customs or laws in force; and by the law of 1866 there was no limitation placed upon the width of a claim, except that same limitation. But by the act of 1872, the substance of which I have quoted—that no claim shall exceed more than 300 feet—the question arose whether that provision was retroactive. It arose on this application for a patent, made under the act of 1866, upon a location antedating the act of 1866. The patent was granted for the requisite number of feet along the line of the lode; but instead of confining itself to three hundred feet on each side of the center of the vein at the surface, as the law of 1872 required, claiming to follow the antecedent laws, gave the locator or patentee a number of acres, some two hundred and fifty acres, on the sides of the lode. Collaterally the validity of that patent came in question in this Lakin *v.* Dolly case, and the circuit court decided, and the circuit court of appeals affirmed the decision, that the provision of the act of 1872 was retroactive, and that the patent was void, even collaterally, because of the excess of surface ground taken over the amount allowed by the act of 1872, and it was decided that the patent line should be drawn in so as to eliminate the excess over the three hundred feet and to leave the patent good for the legitimate amount allowed by the law. A writ of certiorari was applied for in this court, and also a writ of error. The question was elaborately and fully argued; and no argument, I undertake to say, will be made here or can be made here today by Mr. Lindley, occupying the same side that the applicant for certiorari occupied there, which was not fully, clearly, and cogently presented to this court on that application for certiorari.

This court denied the application for the writ of certiorari, thereby, as I contend, establishing the construction of this law, which, I say, has never yet been departed from, though Mr. Lindley, I believe, says to the contrary; but I say I think I can show that it has never yet been departed from in any case, certainly not in this court.

Now, if that provision as to the width of the location in the act of 1872 was controlling, and even sufficient upon which to base an attack upon a patent granted by the Land Department as to the width of the claim, and cut it down to the limits of the act of 1872, upon what basis of reasoning can it be contended that the provision which follows it in the act of 1872, that the end lines of each claim shall be parallel, was not equally retroactive and just as applicable to the Pioneer location made under the act of 1866, so as to bring it within the act of 1872, so far as extralateral rights are held to depend upon the parallelism of end lines? The reason, it seems to me, is clear and plain why both those provisions should be held to have been retroactive. Under the act of 1866 there was no particular objection to allowing an unlimited width of surface to be taken up with the given and restricted length of lode along the vein. There was no reason why it should not be allowed. There was no harm to be apprehended from its allowance. The surface of the ground was only allowed for the convenient working of the lode. The lode was considered the principal thing, the surface ground a mere incidental accessory. All other veins or lodes discovered within the limits of the surface ground were excepted from the operation of the patent granted on a location under the act of 1866. That mineral grant was subject to entry and exploration, to occupation

and patenting by any subsequent claimant who, by his industry and perseverance, should discover ores or veins, and it is known that very often other valuable lodes were discovered in the immediate vicinity of the patented lode, without the boundaries of that lode, without the actual lode itself. No matter how much surface ground they took under the act of 1866, that was the case, and we all know that the most valuable lodes are sometimes found in close proximity to the patented lode, especially in some formations.

But the very moment the statute of 1872 was passed, and I may remark here that it seems to me that the vital, the main, if not the only, distinguishing characteristic and difference between the legislation of 1872 and that of 1866 was based on the recognition of this fact of the discovery, so often made, of other valuable lodes within the limits of the surface patent. But the moment the act of 1872 made the change, the moment the act of 1872 extended the rights and gave these additional privileges to claimants under the act of 1866, your honors will see at once how utterly ruinous and destructive of all policy which pervades and breathes through this whole legislation would have been the provision of the act of 1872 giving to him all the other lodes within the surface of his location. In the very case of Lakin *v.* Dolly he would have had a monopoly of 250 acres or thereabouts of mineral land, with the absolute right, given by the law of 1872, to take every other lode he might find within that whole 250 acres, and there might have been 5,000 feet, or there might have been a mile, or it might have taken up a whole district, and have included a congeries of veins, so as to overturn what Judge Temple approved from Justice Field—the main, great policy of the law to restrict awards

to discoverers to a certain amount of land and allow others to have their chance. So we see at once why any legislature in making that change would have made the corresponding, corrective, and safeguarding provisions restricting width and requiring parallelism of end lines, and also why both should apply to all claims, no matter when located We contend that under the legislation of 1866 parallelism of end lines was necessarily implied—just as much implied as end lines themselves were implied. In the whole statute of 1866 there is not one word or syllable which mentions in terms end lines at all.

Mr. Justice PECKHAM: Does not the act of 1872, providing the limitation of width of claim in part, make end lines parallel?

Mr. GARBER: Yes, your honor, but I want to show the parallelism between the two enactments in order to show that the decision of this court in Lakin *v.* Dolly held the act to be retroactive as to width, and that the same reasons require a holding that the provision of parallelism was retroactive.

Mr. LINDLEY: Do you claim that the denial of a writ of certiorari is tantamount to a judgment?

Mr. GARBER: I do, most undoubtedly. When a writ of certiorari was applied for and denied, after full argument made, I can think of no reason why that should not stand—why the denial of that writ should not stand for all purposes just as high as the most definite affirmance of judgment after granting the writ.

Mr. Justice WHITE: I think you will find that the ruling of this court is that the error in the judgment below does not control at all when the court refuses to grant a writ of certiorari.

Mr. GARBER: I stand corrected, of course; but it would have seemed to me that the refusal by this court of the issue of a writ of certiorari would have that effect, because, unless the court sees some reason why the judgment below should stand, it would seem to me that it would grant the writ.

Mr. Justice WHITE: This court has held in many cases, and it is the well-settled rule of our appellate jurisdiction, that the mere filing of an application for the issuance of a writ of certiorari was not intended to accomplish the abrogation of the writ of error. Otherwise the provision of the act making such judgment final would be nugatory, and judgment could be granted only in exceptional cases. That has been the doctrine of a long line of cases.

Mr. GARBER: That is the rule of this court?

Mr. Justice WHITE: That is the settled rule of the court.

Mr. GARBER: With all due deference it seems to me that the provision for the issuance of a writ of certiorari is to enable this court to prevent the consummation of erroneous judgments.

Mr. Justice WHITE: This court has held directly to the contrary.

Mr. GARBER: Then I stand corrected. But, independently of all that, I claim that the decision of the court in the Lakin *v.* Dolly case and the decision of the circuit court of appeals approving that decision stand firmly upon the reasoning upon which they were founded.

Now, I will say that it seems to me the only practical difference between the act of 1866 and the act of 1872, so far as we are concerned with them here today, was in the giving, as a bounty, an additional privilege consisting of the right to take ancillary and different and distinct lodes.

So far as the principle of parallelism is concerned, intended, as it was, solely to preserve the limitation upon the lode, it was the same and equally inherent and operative under both statutes. And even if I should be wrong in holding that that provision of the act of 1872 was retroactive, still I should ask this court to decide, as Justice Field intimated in the Eureka-Richmond case, that it was not a new enactment at all, but a simple restatement of a pre-existing and acknowledged rule. There are many provisions in this act of 1872 which have been so construed as not new enactments, the only object of the act of 1872 being to make a little plainer and more definite what was already implied in the act of 1866. For example, as I said before, there was not one word in the act of 1866 referring to end lines. End lines were not mentioned.

But in the Flagstaff case, which arose upon a location made under the law of 1866 and a patent already granted and issued under the act of 1866, finally concluded and delivered and accepted by the patentee—in that case it was held that the party, by applying under the act of 1866 and obtaining his patent with surface ground marked out upon his patent, was absolutely bound by the end lines of his patent, regardless of what his rights were or might have been under the original location and regardless of the amount of ground he had taken up in his location. In that particular case I believe the party under the act of 1866 had located—I think it was—2,600 feet in length along the course of the lode. That was allowed him at that time by the law. His contention was that as no end lines were mentioned in the act of 1866, and as nothing was said about them—all that was said in that act was that

the party who had complied with the local rules, usages, and customs, and taken up a certain number of feet, as allowed by those rules, usages, and customs, should be entitled to follow his lode wherever it might go in its descending course, although it might enter land adjoining; and I wish to call particular attention to this provision—which land adjoining shall be held subject to this condition. Now, he had taken up 2,600 feet. He contended that under the language of that act he had a right to his 2,600 feet, and that he also had the right to draw perpendicular end lines at the extremities of his lode, and follow that lode, within those perpendicular end lines, just as Judge Temple decided the parties had the right under this patent. But this court decided that, although end lines were not mentioned in terms in the act of 1866, they were necessarily implied, and that the act of 1872, which, in so many words, speaks of the end lines, and says that the extralateral rights shall be limited and controlled by planes drawn downward through those end lines—this court said that those provisions of the act of 1872 were simply identical with or of the same effect as the provisions of the act of 1866. The language of this court, I believe, was substantially about this: Although the act of 1872 is a little more specific in its terms, the intent of both acts as to side lines and end lines is the same; and that enunciation has been oftentimes repeated in subsequent cases by this court, and is now, as I understand it, the settled rule of this court.

So I say that, as they decided that the provisions of the law of 1872 as to end lines were just as controlling as if they had been embodied in the act of 1866, basing the decision solely on the provision limiting the claim to so many feet

along the lode to any depth, it must follow that that provision would imply in the act of 1866 the same principle of parallelism which is found expressed in the act of 1872.

Mr. Justice McKenna: How do you account for that omission in the act of 1866 and its explicit statement in the act of 1872?

Mr. Garber: In the same way, it might be said, as we account for the omission as to end lines in the act of 1866. Do I understand your honor's question to be, how do I account for the omission of any mention of end lines in the act of 1866? In the same way they said nothing about the parallelism of end lines. Your honors have decided, as I understand, that the intent of the provision was in both laws exactly the same as to both end lines and side lines; and as the end lines were implied in the act of 1866 without being expressed, to the same effect as in the act of 1872, the parallelism of these lines, for the same identical reasons, should be also implied in the act of 1866. There is no reason why the provision of parallelism should not have prevailed under the act of 1866 as fully and equally as in the law of 1872.

Another reason which has suggested itself to me, if your honor please, is this: That the attention of the legislators, when they came to speak explicitly of end lines, and especially when they came to provide for the ancillary lodes as appurtenant to the location, was more directly called to this provision, and it was more apparent why there should be this provision, so as to control the length of the ancillary lodes. Under the act of 1866 it mattered little how much these lines flared. So far as the surface was concerned, you might have taken many feet over and above the amount

allowed by the law; you could have flared your lines so as to get thousands of feet in a short distance. That made no particular difference under the law of 1866 if, as we contend, parallelism was, under it, essential to extralateral right; but under the law of 1872 it might make a vital difference in giving a greater length along the ancillary lode. Therefore, as I said before, it seems to me that the provision in the law of 1872 was not a new enactment, but simply a restatement of a pre-existing and recognized law.

Mr. Justice McKENNA: In other words, your contention is that the law of 1866, under which the lode was extended, furnished authority to carry the length of the lode downward until it passed out of the side lines of that location?

Mr. GARBER: Yes, your honor.

Mr. Justice McKENNA: Then, in order to avoid conflict with other veins and lodes, it became necessary to define the side lines?

Mr. GARBER: That is my idea.

Mr. LINDLEY: There is no provision for making the side lines.

Mr. Justice McKENNA: But the lines are parallel.

Mr. GARBER: In the Flagstaff cases and the cases that followed, all pretense was forever wiped out, if any existed, of the right under the law of 1866 to draw other than your surface end lines. They had established an iron rule that in the United States, under the law of 1866, when you take your patent under that law, if not before, you have bound yourself absolutely to your end lines and planes, and, we contend, you cannot take extralateral rights unless those end lines are parallel. I can conceive of no reason whatever, if the settled doctrine of this court as to locations under the act

of 1872 must deny extralateral rights under flaring end lines—I say I cannot conceive of any reason why, under the law of 1866, it must not equally deny extralateral rights under flaring end lines, because, for all purposes connected with that question, the laws are the same in practical and substantial effect.

In addition to this argument and this position that the rights of the defendant in error here depend upon the law of 1872, and not upon the law of 1866, we give another reason: As I understand it, this law of 1872 had simply proffered as a bounty an additional right, which might be accepted or rejected at the pleasure of the locator under the law of 1866.

Thus I interpret Wolfley *v.* Lebanon and New Dunderberg *v.* Old—that the law of 1872 said to the old locator: You can stand on your rights if you see fit; but you are offered a bounty upon application for a patent; and if you do see fit to accept this bounty and apply for a patent giving you this enlarged and additional right, then in the very act of making application and accepting bounty you subject yourself to all the limitations which are imposed by the law of 1872; if the locator under the law of 1866 had the right to perpendicular end lines, as decided by the supreme court of the State of California, he could have retained those rights, but the new rights would not be conferred until he complied with certain requirements. He can say, I will apply for a patent, and take all these bounties given by the law of 1872, and I will not only take this lode, but all other lodes which may be found within my surface boundaries. Then I take it subject to the conditions of the proffer, and I am bound by those conditions. Consequently, it was decided that

whatever might have been the rights of the party before the passage of the act of 1872, when he applied for a patent under the provisions of the act of 1872 and took a patent under that law, he elected to be bound by all those qualifications, and must have been held to have abandoned, in the language of the court, all his antecedent and inconsistent rights.

They say here that they did not apply under the provisions of the act of 1872. We submit that clearly they did. It is true that they did apply under the law of 1866; that their application had passed to entry and they had made payment, and that for certain purposes that was the equivalent of a patent. But it still did not pass the legal title, and the matter was still under administration and subject to the control of the Land Department, which could have changed the end lines at any time before the actual issue of the patent and made it conform to the laws, as it was the duty, we contend, of the party seeking the additional rights under the law of 1872 to make the lines so conform before he accepted the patent under the law. True, they had made entry; but they went further, and after the passage of the law of 1872 they accepted from the Government a patent giving them not only the right guaranteed them by their location under law of 1866, but these additional rights over given by the law of 1872. *Ipso facto*, by that act, we say, they at once became bound just as much as if they had located under the act of 1872, with all its qualifications and restrictions, and they could no longer claim any end lines but the end lines prescribed by the law of 1872—those running through the surface end lines—and could claim *no* extralateral rights unless those lines were parallel.

In regard even to a patent issued and accepted under the law of 1866, this court decided in the Providence case and in many other cases that the same doctrine applied.

In the Providence case the locator had 3,100 feet——

Mr. Justice McKENNA: Before passing to that, if they had the length of the lode under the act of 1866 and extralateral rights, that would give them the ore in dispute, would it not?

Mr. GARBER: If they had the length of the lode given in this patent and took their perpendicular lines, do you mean?

Mr. Justice McKENNA: Under the act of 1866, as you construe the act.

Mr. GARBER: As I construe the act of 1866 it would be the same as under the act of 1872, and he would be bound by the end planes, and they must be parallel to give any extralateral rights.

Mr. Justice McKENNA: Leave out the necessity of parallelism of surface lines under the act of 1866.

Mr. GARBER: If there was no parallelism required, then of course they would have taken all this ore.

Mr. Justice McKENNA: That is what I mean.

Mr. GARBER: I was going to say that in the Providence case the patent had already been issued and accepted, and the party took about thirty-one hundred feet in his location, which was made long prior to the passage of the act of 1866. By his patent he lost about 700 feet of that lode. This court held that he had lost it. How did he lose it? I say on the doctrine of the Dunderberg case and the Wolfley case, he lost it because, instead of standing by his rights, he came under the law of 1866 and applied for a patent, and, as the law of 1866 was construed with the law

of 1872, and to be substantially the same, he suffered that loss.

So I say here if (which we deny) he ever had any rights to ores not lying within parallel end lines, he waived those rights when he applied for the patent under the law of 1872, which required parallelism in the end lines. He accepted the provisions of that act and renounced all benefits he had before not consistent with it.

Now, I think I have shown that we are claiming here under the law of 1872, and the defendant here is claiming under the law of 1872. We claim under our Silva patent all rights and immunities under the law of 1872, and everything in that patented ground, from the surface of the ground down. We claim that upon a proper construction, the effect of that patent was to grant us absolutely everything from the air down to the lower regions.

Mr. Justice McKENNA: Before passing to that, to avoid some confusion in my own mind, I will ask this: What rights did you acquire under your construction of the act of 1872?

Mr. GARBER: I beg your honor's pardon, but I did not quite catch the question.

Mr. Justice McKENNA: What rights do you claim under your construction of the act of 1872 the locator gained, if he gave up all rights under the act of 1866 and took only those under the act of 1872?

Mr. GARBER: He acquired the right specified in that act, not only to the vein he had located, but to all other veins and lodes and ledges within his surface boundaries, and to the extralateral rights between the parallel end lines.

Mr. Justice McKenna: But I understood you to say that the end lines were not parallel.

Mr. Garber: I thought your honor meant to ask what a man could acquire, not what he acquired.

Mr. Justice McKenna: What rights did the claimant acquire in this case?

Mr. Garber: He acquired the right to all additional lodes within the surface boundaries down and within these four planes extended vertically into the earth.

Mr. Justice McKenna: And he lost what rights?

Mr. Garber: He lost his extralateral rights.

Mr. Justice McKenna: On the main lode?

Mr. Garber: On all the lodes. He lost his extralateral rights because he undertook to accept the bounty provided by the act of 1872, but by the act of 1872 the extralateral rights were limited and could only exist in case the end lines were parallel. It was no hardship for him to make them so, and it was certainly not an onerous requirement for the Government to impose that the party, when he went to get his patent, should simply take the precaution to make his lines parallel on the surface.

Mr. Justice McKenna: Suppose your construction is not correct that he got those lodes; in other words, that the other lodes discovered would necessarily be determined by his end lines, referring you to the Champion case in 171 U. S.

Mr. Garber: But he got them under the lines——

Mr. Justice McKenna: He got them under the surface.

Mr. Garber: He got them under the four vertical planes, and as long as he has them I say he cannot go back again

and reject all that was done at his own instance under the law of 1872.

Mr. Justice McKenna: Then for what he got he relinquished his extralateral rights?

Mr. Garber: Yes, sir.

Mr. Justice McKenna: On all the veins?

Mr. Garber: On all the veins. That is my position. (Note.—Of course, this is on the hypothesis, made for the sake of argument, that there could be extralateral rights under flaring lines, even under the law of 1866.)

Now, I was going on to say we claim under the law of 1872 and under the patent granted under that law, because the Revised Statutes, of course, are the same as the law of 1872—we claim the Silva mine and everything within vertical planes drawn downward through those lines within our claim. That is the right, privilege, and immunity we claim. It has given us everything within those boundaries.

Mr. Justice Peckham: Is there a line on that map showing the boundary between the Silva mine and your claim?

Mr. Garber: Here are the lines. Can your honor see them?

Mr. Justice Peckham: Yes; when you put your finger down there.

Mr. Garber: I will take the pointer and show your honor exactly. Here are the lines of the Silva claim. That is the surface ground. We claim that the law and patent, fairly construed, show our right, privilege, and immunity. We claim it under a law of Congress which granted it to us. We will suppose that that is the Silva claim. That is what we claim. We claim it under a law of Congress which, if fairly construed, will show that our right, privilege, and

immunity should have been granted to us by the court below. What we claim is this: If we got, not this, which we say was the proper construction of the act, but we got this with the slice cut out of it here, as wide as that vein which was claimed by somebody else—in other words, if the decision is that that slice did not pass to us, the result is a denial of the right under the laws of Congress. We say that that patent passed us all that. They say it did not.

Now, is not that setting up a right, privilege, and immunity under the law of Congress which was denied us in the court below? What matters it why it was denied us? For no reason could it have been denied us if we have the right. If that was the fair construction of the law, if that was the effect of the patent, that was our right, privilege, and immunity under the laws of the United States, and the court below denied it. How can it be said that we have only set up a negative claim? It is a positive and affirmative claim. We claim that the statute and the patent granted us that thing. They say they did not, and part of it was left out that did not belong to us.

Now, if we are right, if they had no extralateral rights, then, necessarily, the whole thing passed, and we stand by the statute and by the patent. They say to the contrary. Can it be, both parties claiming under a law of Congress which has various sections in it, that gives one party a certain thing under one section which qualifies the claim by the other party under the other sections—can it be said that that is a mere negative claim and he is not claiming under the statute? In the negation of the one is the affirmance of the other. The moment you decide that they had the extralateral rights you decide that our claim, which we set up

under the law of Congress, was not well founded. And if that decision was erroneous we submit that we have the right to bring the question here and that this court has jurisdiction.

Furthermore, we say that in the Amy case, and especially in the Clark-Fitzgerald case, that very question, that identical question, of jurisdiction was passed upon by this court on a motion to dismiss, which was denied. That established the rule for this court, as I understand.

Mr. LINDLEY: In terms?

Mr. GARBER: Not in terms, but necessarily, because this court does not take jurisdiction and affirm a judgment in the face of a petition, supported by argument, to dismiss for want of jurisdiction, unless the court holds that it has jurisdiction.

In this connection I wish to read a short extract:

In Great Southern Fireproof Hotel Co. *v.* Jones (177 U. S., 449, 453) Mr. Justice Harlan quotes with approval the following from Mansfield, &c., Railway Co. *v.* Swan (111 U. S., 379, 382):

"The rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all the courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

"On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This

question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Now, the Amy case is on all fours with the case at bar. This court must have examined into and decided in favor of the jurisdiction before rendering its opinion on the merits.

In that case it was said of the ore in the Non-Consolidated (corresponding to the Silva here) that if it could not be taken under the extralateral right of the Amy (corresponding to the Pioneer here) "it becomes a part of that claim"—that is, it was part of the property conveyed by the Non-Consolidated patent.

So in other cases here. There was one case—I forget the name of it now—decided by Mr. Justice Gray.

Mr. Justice BROWN: Salva *v.* Bobly?

Mr. GARBER: That is the case. That was a question as to a patent bounded by tide lines. The question was whether it extended to the high-water mark. It was contended that that was a mere State question; but this court said, "No; we have jurisdiction; we must construe the grant; we must decide what that grant covers." So we say here that it was for the court below, and is now for this court, to construe the laws and the patent under which we claim, and to say whether, as we say, it conveyed one thing, or whether, as they say, it conveyed another and a lesser and different thing.

So in the Wells-Fargo case, to which I referred yesterday, decided by Mr. Justice White. It might have been said there that that was a negative claim on the part of Wells-

Fargo—much more so than here. The statute said that the express company should furnish a stamped receipt to the consignor. The company said: We will furnish the stamp receipt but we will increase your charge by that much, so as to make good our loss. It was contended here that the question whether the express company could raise its charges in that fashion was not a Federal question. The decision of the court below was brought here; this court took jurisdiction and said in effect that the court denied a privilege set up by Wells-Fargo under the statute.

So, in bankruptcy cases often decided by this court, where there is a certain exception, it is always decided that the denial of the exception, although it be negative, raises the question of jurisdiction.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1902.

KENNEDY MINING AND MILLING COMPANY
vs.
ARGONAUT MINING COMPANY.
} Nos. 49 and 58.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

DECEMBER 11, 1902.

Closing Argument of Mr. John M. Wright, for Plaintiff in Error.

Mr. WRIGHT: If your honors please, when the record in this case was prepared, counsel had in view two cases, each of which had had the most careful consideration of this court. Each came up on a writ of error; each was, as we insist, on all fours with the case at bar. As in the case at bar, title was alleged to an underground segment of a vein, the apex of which lay outside the claim inclosing such segment. In each of those cases, as here, no title to the ore in question was alleged by the outside party by reason of his ownership of the surface, or of the land, if you please, including such ore. In each of these three cases title was asserted by the outside party under his claim of an extralateral right attaching to the outside claim. I refer, if your honors please, to the case familiarly known as the Elgin case, 118 U. S., 196, and the Amy case, 152 U. S., 419.

As suggested by my question to Judge Lindley, the ques-

tion of jurisdiction was raised in the Elgin case by the objection on the part of the owners of the Gilt Edge claim to the introduction of the title on the part of the owners of the Stone claim. I say it was raised by objection to the introduction of the evidence, just as here.

When the patent to the Pioneer was offered we reserved our objections to that patent as showing title to the *locus in quo* in this case. I apprehend there is no difference in the manner in which these questions were raised in these two cases. For the moment I am not able to recall the exact manner in which the principal question was raised in the Amy case. In the Elgin case, however, when this court came to determine the rights of the parties, the court said "the objection * * * was well taken to the offered proof."

Now, if your honors please, we feel that there has been nothing in the argument of counsel on the other side to make us regret that we have relied upon the authority of these two great cases in coming before you. Whether the writ of error was contested in either of these cases appears to me to be immaterial, because, upon the authority that was read by my associate this morning, and which has gone into the minutes of the stenographer, this court makes it its first duty in every case to determine, first, the jurisdiction of this court, and then the jurisdiction whence the case came.

We consider this a conclusive presumption that in each of these two cases your honors took cognizance of all those questions which affect the jurisdiction and maintained it, because the jurisdiction clearly appeared.

One case that was tried in the United States circuit court in

California, and decided by Judge Sawyer, was suggested by the question asked by Mr. Justice White this morning. The case I refer to is the case known as the Amador-Medean. In that case an agricultural patent had been issued, containing a mineral lode, and by the side of it and subsequently a lode mining claim was located by another party. When the locator of the mining claim undertook to enter underneath the surface of the agricultural claimant, the dispute was raised and the case was decided by Judge Sawyer to the effect that the subsequent locator of the mineral claim would not be permitted to go underneath the surface of the prior agricultural patentee. The matter was brought here, and I have had the history of it here from one of the attorneys in the court below, Hon. A. C. Adams, of San Francisco Before the case was decided here, counsel who had charge for the appellant in this court announced that the same parties now owned both properties. As I recollect the language of the then Chief Justice, he stated that this was not a moot court, and for that reason this court refused to determine the questions involved in that case. It is to be regretted that such was the fact, because that would have presented a precise parallel to the state of facts such as is presented by the question of Mr. Justice White.

We maintain, however, your honors, that in this case we are standing upon our immunity, upon our right under our patent, and not under "common-law right" merely. That has been read into this case by counsel on the other side, and, with all due respect, by the court below. Our claim has always been that the rights on which we stand *were granted to us under the law by our patent.*

It is not a question of presumption; it is a matter of

grant, and the sole reservation was a conditional one. The condition has already been expressed here, and is fully understood. We say that if it be true that our rights in this matter are not protected, that if there is no protection when we are entitled to an immunity of this kind, we are surely at a loss as to how our rights may be protected by this court in any similar case.

However, as I stated at first, we are entirely satisfied to rest this case, so far as the question of jurisdiction is concerned, upon the two cases referred to, each of which is upon all fours with the case at bar.

As I have only a short time, and as there are many points that ought to be discussed, I wish to take up what seems to me the first and most important of all the matters touched upon by Judge Lindley.

One question is as to what rights were preserved by the statute of 1872.

In almost every discussion of this subject to which I have listened, it would seem that counsel understand the language of the statute to mean that both before and after patent, and under all kinds of patents, all rights *claimed* were preserved. If your honors please, we understand the matter this way: that where a man had a *location*, he might preserve that location in its then existing form; but if he he went into the land office and asked for a patent, he must accept that patent under the reservations provided by law.

There are four notable instances illustrating my meaning.

Take the Flagstaff case. Here is a case where the patent itself was granted only a short time before the law of 1872 was passed. The claimant to the lode, as your honors are well aware, claimed 2,600 feet. As I understand the

statute, if he had stood upon his location and had never come in under the law of 1866 and secured his patent, he might have retained his rights, whatever they were. The question as to what those rights were was, I think, the reason for the enactment—first, of the law of 1866, and, subsequently of the act of 1872.

At any rate, the doctrine of counsel in the Flagstaff case and in many other cases was that the lode was the principal thing. In many cases it was the only thing. In the Flagstaff case that doctrine received a severe shock. The claim was there made that all the rights claimed under the location were preserved and protected by the laws of 1866 and of 1872 as well under the patent as under the location. But the Flagstaff decision says: No; you are confined to your rights as defined by your patented lines.

The most recent case of this kind is the Providence case, which was adverted to today. Two segments of the lode were cut off by the patent, and the adjudication of the court maintained the cutting.

Mr. Justice McKENNA: I do not understand what you mean by saying that if he had gone into court he would have reserved his rights under the location.

Mr. WRIGHT: Did I say "the court"? I should have said if he had gone into the Land Department. Excuse me.

Mr. Justice McKENNA: Mr. Justice White says you said "Land Department."

Mr. WRIGHT: I say the same thing was done in the Providence case. There were about thirty feet, according to my recollection, north of the north end line of that claim, and there were 600 feet south of the south end line of that claim.

The adjudication is that the two end lines of the patented ground cut off those two outside portions of the lode. This was a case, too, where the patent itself was granted under the act of 1866.

The decision in Wolfley *v.* Lebanon lays down the same doctrine in clear and explicit terms. However, that is not of the same high authority as the two I have named nor as the last I shall name on that point.

The case of New Dunderberg *v.* Old, 79 Fed., 598, quoted from so extensively and illustrated by Judge Lindley today, laid down the doctrine very clearly in the court of appeals that he might have retained his claims under his location if he had chosen to do so. The doctrine I have enunciated was very clearly laid down, and, as quoted by the distinguished counsel today, the court said it was not the repeal clauses of the act of 1872 that destroyed the claimant's rights; it was his own act when he came into the Land Department and demanded a patent.

Mr. Justice WHITE: Was that a case where application was made for a patent under the act of 1872?

Mr. WRIGHT: In the case of one of the claims in suit it was, and in the other it was not.

Mr. LINDLEY: The Dunderberg was after the act of 1872, and the Frostberg was before the act of 1872.

Mr. Justice WHITE: In what State was the application for a patent at the time of the act of 1872 was passed?

Mr. WRIGHT: My impression is that in the case of the Frostberg application it had passed to entry.

Mr. LINDLEY: The Frostberg had passed to entry. The Dunderberg had not been applied for, as I understand the reading of the opinion.

Mr. WRIGHT: The question there was not as to any outside parts of the vein. The question was not as to the outside parts of any veins. The question was as to the ownership of those parts of the "other veins" found within the boundaries of the claim extended down vertically. The case did not go to the extent of inquiring whether any of the outside parts of the veins were or were not held under the patents. But the doctrine I have mentioned was very clearly and explicitly laid down, so clearly, as we think, that words could not make it plainer.

Counsel has quoted from the statute showing what additional rights were conferred by the statute of 1872 on the owners of the already existing patents—that is, patents that had already been issued under the law of 1866. The law, however, simply says that all the rights conferred by this act are conferred upon the owners of those old patents. Now, does the law say, as counsel contend, that it gave any more?

Under the law of 1872 extralateral rights were granted between parallel end lines. Is there anything in his contention? Is there any meat for him in this particular portion of the statute? We think not. It says the *same* rights were conferred. Those same rights allowed the enjoyment of all lodes within parallel end lines—the other lodes, as the statutes and decisions say, as well as the original lode located. But now the statute does not say, nor does it imply, that the old locations were entitled to *any more* than the new locations. The *same* rights were maintained by the new statute—no more, no less.

Mr. Justice McKenna asked Mr. Lindley whether he could have secured his patent under the law of 1866. We

think he could. The statute of 1872 says applications for patents already made may be continued—I have forgotten the exact language—may be prosecuted to a decision, but where adverse rights do not exist then he may apply for a patent under this act.

What is the condition of the case at bar? There were no adverse rights, and if I read that statute correctly, the old application might have been pursued to patent under the old law. Whatever that law would have given them, they might have come in under it as they did under this law. But all the indicia of this patent make it clear that they took their rights under the law of 1872. The statute gives them all "other lodes." Counsel come here to day and say that they ought to be permitted to claim the extralateral rights between flaring end lines, as to their original lode, and that they ought to be confined within parallel end lines as to their "other lodes," if any be found.

Mr. LINDLEY: I did not say that.

Mr. WRIGHT: I so understood you, Mr. Lindley, but I beg your pardon if I misstate.

Mr. LINDLEY: I said there might be no extralateral right as to the other lodes.

Mr. WRIGHT: There would be no extralateral right. This court has decided that the same end lines bound all lodes, and whatever end lines you have in the Pioneer patent, beyond peradventure those end lines are to bound all lodes. So it is useless for counsel to state here a fact which he does not know, that there is no other lode within those lines. The argument fails. There may be many lodes, each of them of infinitely greater value than the lode in contro-

versy here, just as Mr. Justice McKenna has called attention to the facts in the Providence case.

Now, this brings up again what we conceive to be the reason for this limitation upon the lode as expressed in this statute. The limitation always existed, but when the statute said parallel end lines—to illustrate my meaning I cannot do better than to read from the closing words of the brief we filed in this cause, on pages 73 and 74. It appears that both counsel in the Providence case in this court "conceded," so far as they could "concede" such a thing here or elsewhere, that parallel end lines on the surface were not required under the old locations. This court said:

"It may be true that under the act"—

As I understand this, it means,

"It may be as you gentlemen 'concede.'"

"It may be true that under the act of 1866 the patenting "of the Providence mine in its irregular shape was in all re- "spects legal and proper, and that the act did not require "the location to be made in the form of a parallelogram or "in any particular form, and that there was no require- "ment that the end lines should be parallel. It is also true "that under that act only one vein could be included in a "location, no matter how much surface ground was included "in the patent, but that under the act of 1872 possession and "enjoyment of all the surface included within the lines of "their location and of all veins, lodes and ledges through- "out the entire depth, the top or apex of which lies inside "of such surface lines extended downward vertically, were "given.

"But rights on the strike and on the dip of the original "vein, and rights on the strike and on the dip of the other "veins, we have decided, are determined by the end lines of "the location."

This was upon a claim under the act of 1866, located and patented. Our comments on this language are as follows:

Counsel on both sides in that case, each from his own standpoint, having "conceded" in argument that as to locations and patents under the act of 1866 the end lines of the surface locations need not be parallel, the court, by the foregoing language conceding argumentatively that such *might* be the case, proceeds to call attention to the fact that by means of such locations title to only a single vein could be obtained; and that, if the rule of non-parallelism should be invoked as to such single vein, it must be borne in mind that the act of 1872 confers title to all other veins whose apices are within such locations; so that, as all the lodes within a location must be bounded by the same end lines, the rule of non-parallelism would have to be applied, with the result shown by the illustration (see page 72, brief of plaintiff in error) to a set of lodes the title to which was conferred by a statute the cardinal principle of which is parallelism.

The language of the court implies that no such extraordinary privilege can be conceded to such "other veins" within old locations; and if not, then, since all the lodes within a location must be bounded by the same end-line planes, it is clear that the orignal vein must be bounded by parallel planes, so as to be included within the same planes bounding the "other veins," which planes, for the reasons shown, must be parallel.

Now, it is simply impossible to discuss all these questions within the time permitted.

A great deal has been said here about explaining away the decisions in Lakin *v.* Dolly and Lakin *v.* Roberts. I

undertake to say that those are two cases that cannot be explained away. Those two cases were decided, as the court in each case stated, *under the statute.* I will read rapidly, with your honors' permission, from the decision of Judge Hawley in Lakin *v.* Dolly, 53 Fed., 333, as follows:

"It is claimed by plaintiff that upon the facts of this case, "and under the provision of sec. 2328, R. S. U. S., the patent "must be considered and treated as having been issued "under the act of Congress of 1866. It is immaterial, so far "as the result of this decision is concerned, whether the "patent is construed with reference to the act of 1866, or the "subsequent provisions of the Revised Statutes, under and "in pursuance of which the patent purports to have been "issued; but I am of opinion that the question as to the va-"lidity of the patent depends upon the construction to be "given to sec. 2320, R. S.

"This section reads as follows:

"'Mining claims upon veins or lodes of quartz or other "'rock in place bearing gold, silver, cinnabar, lead, tin, cop-"'per or other valuable deposits, heretofore located, shall "'be governed as to length along the vein or lode by the "'customs, regulations, and laws in force at the date of their "'location. A mining claim located after the 10th day of "'May, 1872, whether located by one or more persons, may "'equal, but shall not exceed 1,500 feet in length along the "'vein or lode; but no location of a mining claim shall be "'made until the discovery of the vein or lode within the "'limits of the claim located. No claim shall extend more "'than 300 feet on each side of the middle of the vein "'at the surface, nor shall any claim be limited by any "'mining regulations to less than 25 feet on each side of the "'middle of the vein at the surface, except where adverse "'rights, existing on the 10th day of May, 1872, render such "'limitation necessary. The end lines of each claim shall "'be parallel to each other.'"

Now, under the language of the court this entire section seems to be clear, and we would like to adopt this as our own:

"This entire section seems to be clear, definite, and cer-
"tain. It provides that all mining claims upon quartz
"lodes located prior to its passage should be governed, as
"to the length of the claim along the lode, 'by the cus-
"'toms, regulations and laws in force at the date of
"'their location;' that the claims located after May 10,
"1872, 'may equal, but shall not exceed, 1,500 feet in
"'length along the vein or lode.' So far the section re-
"lates solely to the question of the length of the lode
"that may be located. It next takes up the question as to
"how much surface ground will be allowed to the locator of
"a quartz lode, and says that 'no claim'—evidently mean-
"ing all claims, whether coming within the first clause re-
"lating to claims located prior to the passage of this section,
"or within the second clause, relating to locations made sub-
"sequent thereto—'shall extend more than 300 feet on each
"side of the middle of the vein at the surface.' Having thus
"expressed the extent of the surface ground to which the loca-
"tor may be entitled, it further provides that the amount of
"the surface ground shall not in any case be limited by
"any mining regulations to less than twenty-five feet on
"each side of the middle of the vein at the surface, except
"in certain contingencies which have no application to the
"facts of this case. After the passage of the act of which
"this section forms a part, it seems very clear to my mind
"that the Land Department had no jurisdiction, power, or
"authority to issue a patent for a quartz lode to any surface
"ground exceeding 300 feet in width on each side of the
"middle of the vein or lode, and that any patent which is
"issued for more than that amount of surface ground is ab-
"solutely null and void as to the excess over 300 feet, and
"can be collaterally attacked in a court of law."

I am entirely aware, if your honors please, that Judge Hawley undertook to explain away this decision by saying that it was an important fact in the case that the local regulation allowed only 100 feet of surface. But, if your honors please, I desire to ask, with all due respect to Judge Hawley, if the local regulation allowed only 100 feet, and if this decision was based upon that regulation, how is it that he allowed 300 feet by his decision? When this case went up to the court of appeals the decision there was rendered by his honor Mr. Justice McKenna in Lakin *v.* Roberts, 54 Fed., 461. We think that decision throws light on this subject. He says:

"Plaintiff's counsel contends that the provision for the "width of claims applies only to subsequent locations, and "that section 2328 of the Revised Statutes reserves to plain- "tiff the provisions of the act of July 26, 1866. Section "2328 of the Revised Statutes is as follows:

"'Applications for patents for mining claims under former "'laws now pending may be prosecuted to a final decision "'in the General Land Office, but in such cases, where ad- "'verse rights are not affected thereby, patents may issue in "'pursuance of the provisions of this chapter, and all pat- "'ents for mining claims upon veins or lodes heretofore "'issued, shall convey all the rights and privileges conferred "'by this chapter where no adverse rights existed on the "'10th day of May, 1872.'

"It is not contended that plaintiff's interests were so far "vested that, by that act, Congress had no power to limit or "vary them. We shall assume, therefore, that Congress had "this power, and, having it, we think it exercised it in the "provisions we have quoted. The language of the section "of the Revised Statutes must be confined to preserving the "application, and of all rights except the size of the claim, "length and width of it."

And what more important feature as to the length of the claim could there possibly be than this requirement of parallelism? Taking this language in its broadest sense, as I understand his honor meant it, that feature—that incident as to the length of the claim—is one of those which the statute meant to make universal.

Mr. Justice McKenna: I have forgotten that case in its entirety, but was not that more concerned with width than length?

Mr. Wright: It was the width.

Mr. Justice McKenna: Was the act of 1872 heard of then?

Mr. Wright: Not at all. The distinction Judge Hawley draws is between the first half and the last half of the paragraph, the *first* referring to the *old* locations, and the *latter portion* to *all* locations.

Mr. Justice McKenna: Those who claim rights under the act of 1872 may be more concerned with the width of the claim than with the length of the claim, because, under the act of 1866, the single lode was given to a length along the lode, and hence the width of the claim was not given. Until the act of 1872 the width was a matter of no importance.

Mr. Wright: That is correct.

Mr. Justice McKenna: Is not that the explanation of those cases?

Mr. Wright: That is a portion of the explanation.

Mr. Justice McKenna: In the absence of authority, is it not in this case?

Mr. Wright: In direct connection with that view is the necessity for a bounding plane to these extra veins granted

by the act of 1872, and, in our opinion, that is why the requirement of parallelism was added.

One point here is as to whether the patentee here had notice. Mr. Lindley laid stress upon that. It appears to us that the statute itself was all the notice that was necessary. A statute always gives notice, and when that statute was passed, then, if the party owning the existing equity desired to enjoy all the rights and benefits of the new statute, he should have made his claim comply, the statute itself being a sufficient notice.

I must advert for a moment to the Eureka case. Judge Lindley is mistaken when he says this case was parallel with the case at bar. If there existed up here on this map (showing) a claim with parallel end lines back of the Pioneer, the parallel would be nearer.

I think I am justified in the idea that the Champion claim parallel end lines were the controlling element, in so far as the judgment went upon the end-line question. I use the quotation used by Mr. Lindley in his brief:

"The particular mining ground in dispute is situated "within the zone of limestone which has been described and "within planes drawn vertically down through the end "lines of the Champion Company as patented"——

It appears to me that by mentioning this first the court makes it the cardinal fact——

"and within planes drawn vertically down through the ex- "treme points of the patented locations of the At Last and "Margaret claims at right angles to the course or strike of "the zone and produced so as to follow its dip."

"The top or apex of the zone is within the surface lines "of the patents to the Eureka Company, and the zone dips at

"right angles to its course and on such dip extends under the "surface of the Arctic and Utah claims. * * * The end "lines of the surveys of the At Last and Margaret (Lupita) "claims as patented are not parallel with each other.

"The finding that the ground in dispute is within the "end lines and that the apex is within the surface lines set- "tles the rights of the parties between themselves as well "under their patents as under their compromise agree- "ment."

This case was decided, as your honors are well aware, upon the compromise agreement.

Mr. LINDLEY: That is the language of the Supreme Court of the United States.

Mr. WRIGHT: Yes, as I read it.

Mr. Justice MCKENNA: What does it mean? What does that language mean—"rights of the parties between them- "selves as well under their patents as under their com- "promise agreement?"

Mr. WRIGHT: If your honor please, the two parallel end lines of the Champion were first mentioned. The court next draws attention to bounding planes drawn vertically down through the extreme points of the lodes in the other patents, and those are the two sets of end lines that seem to have been under consideration at the time.

Your honors will bear in mind that this case was decided or at least the opinion was written, by Mr. Chief Justice Waite. Five years after this case was decided the Elgin case was decided. Mr. Chief Justice Waite dissented from the decision in that case, and again advanced the doctrine that the extralateral right should be bounded by vertical planes drawn downward at right angles to the general course

of the lode from the end points of the lode within the location. It has been our understanding that that was his view when he wrote the opinion in the Eureka case—between the end-line planes drawn down at right angles—and that phrase, we think, is what was meant, the parallel end lines; that is, the surface parallel end lines of the Champion extended and the other end lines drawn as I have described and as I understand him in his dissenting opinion in the Elgin case.

Mr. Justice McKENNA: There were different patents for different locations?

Mr. WRIGHT: Separate patents.

Mr. Justice McKENNA: You confine your explanation to one location, do you not?

Mr. WRIGHT: Not at all. The language here is that the ore in dispute was this portion of the Potts chamber (showing), which was between the end lines of the Champion, extended downward and between end-line planes drawn from the end points of these other locations (showing) at right angles to the general course of the lode.

Mr. Justice McKENNA: I understand you now.

Mr. WRIGHT: Those appear to have been the end lines which he intended, and we think that all the more because of his remarks in his dissenting opinion in the Elgin case, not believing that within the short space of five years he had discarded his already well-considered opinion.

Mr. LINDLEY: The first opinion was under the act of 1866 and the last was under the act of 1872.

Mr. WRIGHT: That cuts no figure. Mr. Chief Justice Waite applied the rule to all claims, and we say the same rule applies to all claims.

I will stop, your honors, whenever my time expires.

Mr. Chief Justice FULLER: Your time is out.

Mr. WRIGHT: If your honors please, I leave the discussion of these matters the less reluctantly because we have fully expressed our views in the brief we have presented for the consideration of the court.

At the suggestion of my colleague, Mr. Garber, the argument made by myself in the trial court was printed as a part of this brief. I may say that, if I had the time and could do so, I would be glad to present the case to your honors in almost exactly the same way again, the only changes I would make being those of verbiage, and for this reason we most respectfully but urgently ask your honors to consider it in your examination of these questions.

Mr. LINDLEY: May we have ten days to print and file our oral arguments?

Mr. Chief Justice FULLER: Probably ten days is longer than necessary.

Mr. LINDLEY: What will the court allow?

Mr. Chief Justice FULLER: Five days will be allowed to print and file.

ADDENDUM.

By consent of counsel the following suggestions as to the Eureka case are added as part of the argument of Mr. Wright:

In the Eureka-Richmond case the question in the case at bar was not *decided*. The decision is correctly stated in the syllabus. The *findings* in the record were made special, so as to leave it open to argue in this court the question of lode or no lode. That question was fully argued. Mr. Wren

in his oral argument for the Richmond said that if the whole zone was not one lode the case was probably correctly decided. This court declined to decide the question of lode or no lode. This we infer from the following language of the opinion: "Whether the limestone *was or was not* within the meaning of the acts of Congress * * * a single vein, lode, * * * it was all mineralized," etc. (Italics ours.) And especially from the fact that such a question presented and argued as it was in that case would never have been decided by mere implication or without definite statement of the reasons. And it follows that it could not have been intended to decide the question of extralateral rights under patents with flaring end lines.

If there was no lode within the meaning of the statutes, there could have been no extralateral rights, whether the lines were parallel or not. It is, therefore, clear that the whole case went off, as stated in the syllabus, on the compromise agreement. There was no finding that any particular *lode* apexing in the patents could be followed into the Potts chamber. The finding was that the *whole zone* was at right angles in its course to the end lines of the Champion. This will appear from the diagram and the finding of the course of the zone. Now, if this zone was not a *lode*, a question waived, as we have endeavored to show, the question of the parallelism of the end lines, in view of the compromise agreement, ceased to be involved or necessary to be decided. And so the language of the opinion was framed to express the thought that the compromise agreement disposed of the case, and that the Richmond Company, by reason of that agreement, were *precluded* from raising the question here involved. In other words, the question here raised could not be decided

in the Eureka case. This is made still plainer by the expression that the findings gave the right to the Eureka both under the patents and the compromise agreement. Because that expression is carefully phrased and guarded to exclude any thought of deciding the question as here presented, it is said that their rights are settled *as between themselves*. The language is: "The Richmond Company is in no condition to dispute the validity of the Eureka patents for the At Last and the Margaret because the end lines of the survey are not parallel, *as it has agreed* with the Eureka for a consideration not to work in the limestone to the south and east." (Italics ours.)

That was undoubtedly so, both because of the agreement and of the warranty deeds. It was equivalent to saying that the deeds and agreement settled the questions regardless of the parallelism of the lines. Moreover, even if the whole zone was held to constitute a lode, a glance at the map will show that the Eureka had patents enough with strictly parallel end lines to take the part of the Potts chamber which was in controversy and all the ground in dispute, as covered by patents with parallel end lines, excluding such as the Margaret.

So the Eureka case could only be a precedent here in regard to the compromise, and in regard to that in our case none was allowed to be proved, and it is therefore here as if absolutely non-existent.

Murdock cases, 20 Wall., since followed—see.

IN THE

Supreme Court of the United States.

Nos. 49 and 58. October Term, 1902.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY,

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY,

In Error to the Supreme Court of the State of California.

Petition for Rehearing.

Now comes the plaintiff in error, Kennedy Mining and Milling Company, and respectfully petitions this Honorable Court for a rehearing of the above entitled cause, for the following reasons:

In the case there was involved in its inception a federal and a non-federal question. The first whether upon a correct construction of the laws of Congress under which both parties claimed title, the ores in question passed by the Pioneer patent or

by the Silva patent. The second whether the plaintiff in error is estopped from claiming that the title to the ores passed by the Silva patent.

The opinion, as we read it, affirms that the first presents a federal question conferring jurisdiction. This assumption of jurisdiction involves the conclusion that the State Court did not base its judgment on the estoppel, but did base it on the law raising the federal question.

Johnson v. Risk, 137 U. S., 309.
Eustis v. Balles, 150 U. S., 367.

The record necessitates the same conclusion, inasmuch as the facts upon which the estoppel was based were excluded on objections to them as evidence. The objections were to all and singular, each and every the facts stated in paragraph 7 and paragraph 8 of agreed statement (Printed Trans., p. 41, f. 82). Among the grounds of objection were that the agreement as to common boundary line is neither recited nor referred to in the Kennedy patent, nor recorded in the office of County Recorder of County where the mine is situated, nor is it alleged that plaintiff in error was a party to said agreement or had notice or knowledge of it, either when it acquired title to the Kennedy, or when it acquired title to the Silva (Trans., p. 42, f. 83).

The facts *so ruled out* and excluded from the case, are set forth in paragraphs VII and VIII of said statement (Trans., pp. 14-15, ff. 32-33).

The ruling out of these facts was a decision against the estoppel, for thenceforth everything tending to show any surface conflict between the old Kennedy and Pioneer Companies, every proceeding taken thereupon and every agreement between the companies was expunged and the Court could hereafter take no notice of them and make no decision based upon them. They stood by the very terms of the agreed statement as if they had never been inserted in it or in any way brought to the knowledge of the Court. It was not, properly speaking, an agreed statement of fact, but was, and was carefully expressed to be, merely a waiver of or dispensing with formal proof of facts, subject to the ruling of the Court on their competency. (Trans., pp. 12-13, ff. 28-29.)

By the same express provision, the ruling which excluded this evidence must "be deemed and taken as duly" excepted to by

the defendant in error, and if the ruling was erroneous, the only possible correction was a reversal and a new trial upon which the plaintiff in error would have the right to avoid the effect of the admission of the evidence by any showing consistent with its truth. The Supreme Court of California by its constitution and the Constitution of the State and according to its settled practice could itself make no *finding* of the facts alleged to constitute the estoppel. Kellogg v. King, 114 Cal., p. 389. The only *finding* made by the ~~Supreme~~ Court was its ruling adopting portions of the so-called agreed statement and rejecting and striking out the remainder.

The opinion of the Supreme Court of California shows acceptance of the ruling out of this evidence, and that the judgment was based solely on the law raising the federal question.

Assuming, as we may, for the purposes of this petition, that the federal question was erroneously decided below, we have a case involving two questions, one federal and one not, the former decided erroneously against the plaintiff in error, the other decided against the defendant in error. In such case, we submit, the judgment cannot be affirmed. As said in the Murdoch case, 20 Wall., 635, any examination "into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain *if any such have been decided*, and their sufficiency to maintain the final judgment, *as decided by the State Court.*"

A judgment unsustainable on the Federal question, may be sustained by a decision, correct or incorrect, of a non-Federal question actually made by the State Court; but not by the existence of a non-Federal question undecided by the State Court; and *a fortiori*, not by the existence of such a question actually decided by the State Court in favor of the plaintiff in error.

It follows from Eustis v. Bolles and other cases, that this writ of error was not dismissed, but jurisdiction was taken, *because* it affirmatively appeared from the record that the judgment below was rested upon the Federal question; but even if it had appeared that the Court below decided the independent question in favor of the defendant in error (that is, that the objection to the evidence of estoppel was overruled), and not on the law raising the Federal question, this Court would not have assumed jurisdiction of the case, even though it considered the ground of estoppel not good or valid. By strict parity of reason, when the record, as here, affirmatively shows that the State Court

decided the independent ground, to wit, the estoppel, in favor of the plaintiff in error, by rejecting the evidence offered to sustain the estoppel, thus precluding any possible presumption that the judgment was based on the non-Federal question, all reason for a consideration here of the correctness of the ruling on the independent ground ceases. In such case, as said in the Murdoch case, there is no possibility of injustice being done by reversing a judgment which must in the end be reaffirmed by this Court, which on another appeal would simply confine itself to the Federal question, leaving the determination of those involving only consideration of local State law and policy, such as the estoppel, to the final arbitrament of the State Court, which by conclusive presumption here must adhere to its former ruling already in that Court made the law of the case by its practice and rules, and certainly made final and ended by the action of this Court after assuming jurisdiction on this writ.

Even if the examination in this Court is not, as we understand its careful enunciations (see 20 Wall., 635), limited to the ascertainment whether points other than Federal were decided and their sufficiency (that is, the sufficiency of those decided in favor of defendant in error) to maintain the judgment, and may be made for the purpose of determining whether they were correctly or erroneously decided, we earnestly request a reconsideration of the question whether on this record, the ruling excluding the evidence of estoppel was not clearly correct for the reasons assigned in the specific objections to the testimony.

If we are correct in any of our contentions as to the Federal questions—if independently of any question of estoppel or agreement, the Argonaut had no extralateral rights, then the ores in controversy were at the time of the location of the Silva the property of the United States, part of the public mineral domain and subject to location and appropriation under the laws of Congress. This is not only, we submit, self evident, but practically most important, as the ruling here must apply to all mining patents with flaring lines heretofore issued or hereafter to be issued. By it does not this Court authoritatively announce that such locations, however violative of the letter and spirit of law, however destructive of its just limitations as to quantity, may be held good against all subsequent locators, because made in pursuance of some agreement between adjoining locators to disregard the law, thus held binding and enforcible not only as between and against the conspiring or agreeing parties to the

agreement, but against all third parties, without proof or evidence of notice of the agreement, actual or constructive. Surely the Eureka case cited in the opinion does not justify such a novel extension of the doctrine of covenants running with the land.

In the Eureka case the agreement was explicit and between the same parties, and in addition to the agreement there were binding deeds and covenants and warranties. Here the plaintiff in error was neither party nor (so far, at least, as and to the full extent that, it claimed under the Silva) privy; and one of the sustained grounds of objection to the evidence was that it had no notice actual or constructive. The record shows that the ground was well taken. The agreement was not recorded, nor is there anything in the Kennedy patent to put a purchaser from the patentee on notice of the contest or of the agreement. Although the specific objections to the evidence apprised the defendant in error of this, not a scintilla of evidence was proffered to obviate them. We cannot conceive how or on what principle this ruling on evidence could have been other than it was. The plaintiff in error was a purchaser of the Kennedy ground, it is true. But it is shown to have had no other relationship to the patentee thereof. There was nothing in the chain of title to even put it on inquiry. It made no agreement or covenant whatever with the defendant in error or its grantor. It knew nothing of the agreement or the contest except what appeared on the face of the Kennedy patent and that was nothing. Can it be that every purchaser of patented mining ground, by the mere act of purchase becomes affected by all unrecorded agreements between his grantor and the patentee of neighboring or even adjoining and coterminous mining claims? Does the fact of such purchase imply an obligation to respect the claims of adjoiners and estop the purchaser from acquiring adverse titles to them? There was no relationship whatever, certainly no fiduciary one, between the plaintiff in error and the defendant in error or its grantee to prevent the former from standing at arms length to the latter. In every purchase of a patented mine, the purchaser may be said to have notice of the facts in his own chain of title. He cannot be held to constructive notice even of the fact of adjoining locations, much less of their boundaries, and whether they are coincident with some of his. Even if the plaintiff in error were affected with constructive notice that the Pioneer patent had a common end line with the Kennedy, how can such notice merely work any

estoppel or bring into play the doctrine of the Eureka case or estop it from locating unappropriated ground subject to location under the law? It does not follow from the fact of the coincidence of two patented end lines, that such coincidence was the result of any agreement between any of the locators or patentees, nor does it even suggest any such agreement, much less any contest or compromise. If there had existed any other defect in the Pioneer title, or any other paramount claim, such as a tax title or a trust or a lien, etc., would anyone say plaintiff in error was estopped from purchasing the adverse title and asserting it? If not, why is it estopped by the mere knowledge, had such existed, of the coincidence of the end lines, from acquiring the true title which was in the Government? We respectfully submit that every element of estoppel, is wanting. It does not even appear that the plaintiff in error located the Silva. It may have been located by some third party and sold to the plaintiff in error. On the defendant in error was the onus of proving the estoppel, and in the absence of any showing on this point we have the right to assume that such was the fact. If so the title to the ores in question undoubtedly passed by the location to the locator. Of this the Silva patent is conclusive. That locator had the right to pass the title to any one. If the plaintiff in error had made a warranty deed to this defendant in error, then such an after acquired title would pass to it. If as in the Eureka case, it had covenanted for a consideration as there said, not to claim or exercise any right beyond a compromise line, an estoppel might arise. But will this Court say such a title could be affected by the mere constructive knowledge that one of the end lines between the Kennedy and Pioneer happened to be coincident or identical?

In that portion of the brief of the defendant in error which the Court has in part adopted and followed, it is said (p. 7) "It is but fair to state that the trial Court *declined to consider the agreement as a factor in the case and sustained the objection of plaintiff in error thereto.*" And (pp. 62-63) "whether or not we may consider the agreement * * * as valid and binding on the successors in interest of the two original companies who were parties to it, certainly the present Kennedy Company purchased with the knowledge that there was a common boundary established as such by the parties * * * of one thing we are quite sure the common boundary * * * was fixed as the

result of an adverse proceeding in the land office, and the agreement entered into in respect thereto."

But how can this Court be sure or know that the boundary was fixed as the result of the adverse proceeding or the agreement. By the very concession of the brief these facts were excluded and are not in the case.

Then the brief cites a California case, McGee v. Stone. But obviously all that case holds is that *in so far as the purchasing parties rely on the title purchased* they may be bound by the acts of their grantor. The case could only be in point or applicable, if no location of the Silva had been made, and the plaintiff in error as the grantee of the old Kennedy Company and solely by reason of its purchase and ownership of that title, had sought to attack the validity of the compromise line and agreement. On the ground, for example, as was the case in McGee v. Stone, that the agreement had been made by mistake. Irrespective of the contest and agreement, the only value or pertinence of notice of the fact of the common boundary line, arising as it does from the fact of purchase, must be limited and confined to the assertion of the rights purchased. The act of purchasing and the knowledge concerning the thing purchased cannot be tortured or twisted into an agreement not to purchase something else in no way affected by the thing of which knowledge is so imputed. You might as well say that an heir by inheriting was liable for the debts of the ancestor not only to the extent of the assets, but was estopped from denying the validity of such debts when sought to be enforced out of his own property.

The opinion of this Court says (italics here and elsewhere ours) "The common boundary A. B. crossing the lode *was fixed as the result of an adverse proceeding in the land office, and the agreement entered into with respect thereof was as set forth in the agreed statement of facts.*"

With respect to this statement so made a ground of affirming, we beg leave earnestly to repeat, that the State Court having decided in favor of plaintiff in error upon the questions involved and embraced in the matters set out in paragraphs VII and VIII of the statement of facts, relative to said agreement and estoppel, its action is conclusive upon this court.

In Murdoch v. City of Memphis, 20 Wall., 635, this Court has said: "We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the State Court ruled correctly on them or not.

We are of opinion that on these subjects not embraced in the class of questions stated in the statute we must receive the decision of the State Court as conclusive."

Even if this Court has the power and right to review the action of the State Court as to the non-Federal questions arising out of the aforesaid agreement, it is apparent that the State Court did not err in its ruling upon the objections interposed thereto by the plaintiff in error. Such objections were properly sustained under the laws of the State of California for these reasons:

The agreement being unrecorded and not executed by the parties litigant in this case but only by their grantees respectively of the Pioneer and Kennedy claims, is not valid as to the plaintiff in error who is a purchaser without notice of such agreement.

> Civil Code Cal., Secs. 1214, 1215, 1217.
> Calanchini v. Branstetter, 96 Cal., 612.

The unrecorded contract was made February 20th, 1871 (record page 15), the United States patent was issued for the Kennedy mine on July 29th, 1872 (record, page 16), in which patent no reference whatever is made to such agreement, and the plaintiff acquired such patented title on December 28th, 1886 (record, page 31), more than fifteen years after the issuance of the Kennedy patent. It would be extremely inequitable to read into the Kennedy patent this unrecorded agreement as against a purchaser without notice under the patent by mesne conveyance after such a lapse of time.

It is plain that such agreement could not in any wise affect the title of plaintiff in error to ores lying within the area of the Silva mine patented by the United States February 6th, 1893 (record, page 31), twenty-two years after such agreement was made by total strangers to such Silva title.

Plaintiff in error bases its ownership of the ores in question solely upon its ownership of and title to the Silva ground, and *quoad* the Silva at least, plaintiff in error is *neither party nor privy to the agreement made in 1871 by and between* the then owner of the Kennedy and Pioneer claims.

Whether we treat the alleged matter of estoppel as a covenant running with the land, or as a personal contract or obligation of the grantor of the plaintiff in error, like that in Middletown v.

Newport, 16 R. I., 319, cited 8 Am. and Eng. Ency. of Law (2d edition), p. 140, and consequently enforceable only against parties *affected with notice*, the result is the same.

That in California, the local law of which governs, the agreement cannot be dealt with as a strict covenant running with the land admits of no doubt, and with the absence of evidence of notice fully accounts for the ruling rejecting the evidence. Sections 1460 to 1464 of the Civil Code of California settle this.

Whenever and wherever the books speak of covenants, or estoppels as binding privies as well as parties, it is understood that as the obligation is the result of privity, it is limited to the extent of the privity. It exists only *quoad* the estate the purchase of which constitutes the privity, and affects not at all the purchaser so far as he claims and has other rights good in the hands of a third party, not privy and from whom he has also purchased. Such estoppels never bind strangers or those who claim by title paramount the deed. When the plaintiff in error purchased the Kennedy title it acquired it for itself and pledged no faith to maintain it, and with full "right to fortify that title by the purchase of any other," nor can any doctrine of estoppel bind it without notice.

Blight's Lessee v. Rochester, 7 Wheaton, 535, followed in Bybee v. Oregon, 139 U. S. 681, which sustains the proposition that so far as estoppel is concerned, the plaintiff in error was placed *in no worse position* by having accepted a deed from the old Kennedy Company, than if it had located the Silva, without acquiring the Kennedy title. The same follows from Osterhout v. Shoemaker, 3 Hill P. 518, and Sparrow v. Kingman, 1 Comstock, 256. *As grantee*, plaintiff in error, merely as such could not be estopped by acceptance of its deed; and could be so estopped in any view, *only where and to the extent that it is making its title under such deed, and asserting its claim solely* by reason of it.

Hunt v. Wright, 47 N. H. P. 401,

Even if there be notice, the estoppel binds only where and so long as the grantor's title "is the only one in question, and no estate has been derived from any other source."

2 Smith's Leading case, Sixth Am. Ed. (1866) P. 717.

McGee v. Stone is not at all to the contrary. It is entirely consistent with the two propositions that the grantee without

notice is not bound at all, and that a grantee with notice can only be estopped where and to the extent that his *only* claim is based upon the title granted and accepted. To that extent and to that extent only he stands in the shoes of his grantor. In McGee v. Stone, the *mutuality* of the estoppel was assumed. Here *quoad* the Silva there could be none, as shown by the authorities above cited. There not only was *notice* assumed, but further as an element of estoppel that all the parties *relied upon* and acted in view of the facts set up as matter of estoppel.

To summarize the matters here insisted upon, it is obvious that the State Court by its decision sustained the objections made by plaintiff in error, in effect dismissed from its consideration all matters contained in the agreed statement of facts relative to the compromise agreement,—completely eliminated that element from the case, and decided *its questions in favor of plaintiff in error;* and all subsequent proceedings in the case, affirmatively show that not only the State Court did not base its judgment upon the matters of such agreement, but on the contrary that the State Courts, both trial and appellate, solely based their judgment adversely to plaintiff in error upon the Federal questions involved.

Plaintiff in error respectfully insists that the cogency of these reasons, and the binding force of these principles, ought to impel this Court to grant a rehearing of this cause upon all the questions properly involved therein upon the writ of error heretofore granted.

Respectfully submitted,

JOHN M. WRIGHT and
BYRON WATERS,
Attorneys for the Plaintiff in Error.

JOHN GARBER,
Of Counsel.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded. It is not interposed for delay.

John Garber
of Counsel

John M. Wright
and Byron Waters
Attorneys for Pff in Error

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 575.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY,
Defendant in Error.

Motion to Dismiss Writ of Error or Affirm the Judgment.

Comes the defendant in error herein, by its counsel, appearing in that behalf, and moves this Honorable Court to dismiss the writ of error in the above entitled cause, as this Court has no jurisdiction thereof.

And said defendant in error, by counsel as aforesaid, also moves the Court to affirm the judgment upon the following grounds:—

FIRST. It is manifest that even if this Court has jurisdiction the question on which jurisdiction depends is so frivolous as not to require further argument.

SECOND. The alleged federal question involved in the action was decided by the Supreme Court of California in accordance with the prior decisions of this Court.

THIRD. The decision of the Supreme Court of California is obviously correct, and could not have been otherwise upon the record presented.

FOURTH. Said writ of error was manifestly sued out for delay only.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Defendant in Error.

To Messrs. John M. Wright and Byron Waters, attorneys of record for plaintiff in error in the above-entitled cause:

You are hereby notified that the defendant in error in the above named cause will, on Monday, the 15th day of April, A. D. 1901, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motions, and the brief thereon hereto attached.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Attorneys for Defendant in Error.

Service of the foregoing motion, notice, printed argument in support of said motion, and copy of the printed

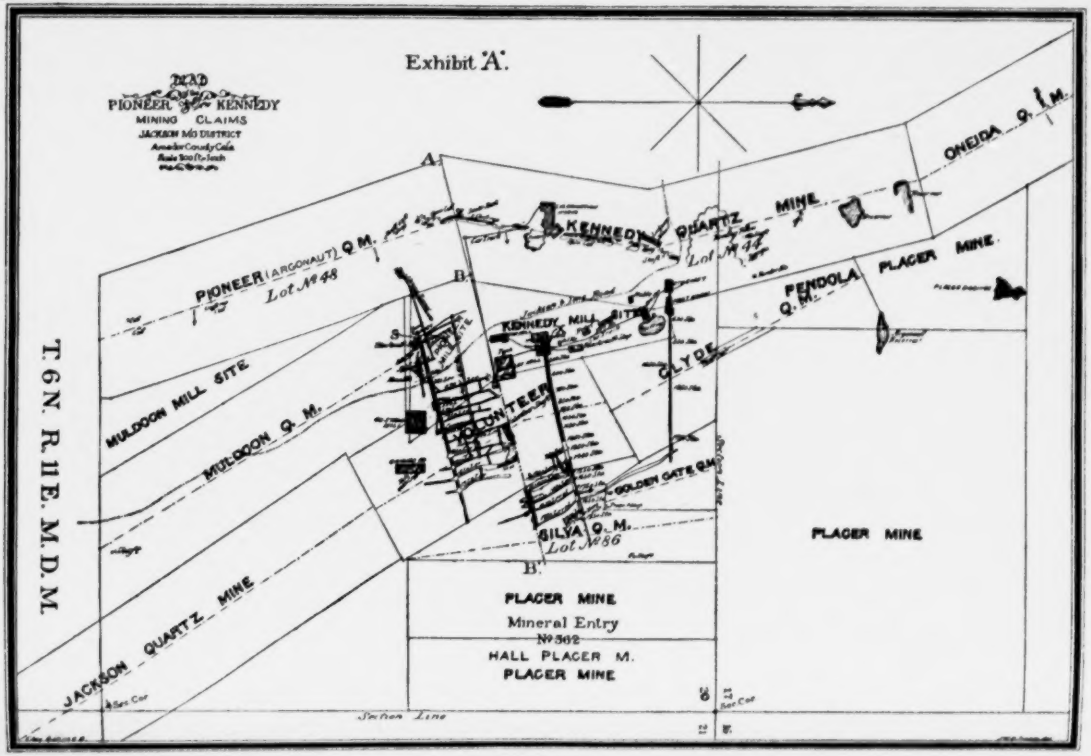


Exhibit 'A'.
MAP
PIONEER & KENNEDY
MINING CLAIMS
JACKSON MD DISTRICT
Amador County Cala.
Scale 200 ft. to Inch
T. 6 N. R. 11 E. M. D. M.
PIONEER (ARGONAUT) Q. M.
Lot № 48
KENNEDY QUARTZ MINE
Lot № 49
ONEIDA Q. M.
PENDOLA Q. M.
PLACER MINE
KENNEDY MILL SITE
MULDOON MILL SITE
MULDOON Q. M.
VOLUNTEER
CLYDE
GOLDEN GATE Q.M.
SILVA Q. M.
Lot № 86
PLACER MINE
JACKSON QUARTZ MINE
PLACER MINE
Mineral Entry
№ 562
HALL PLACER M.
PLACER MINE
Section Line
A
B
B'
S

record herein, and receipt of copies of the same is acknowledged this 14th day of March, 1901.

John M. Wright
Byron Waters.
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

The action is trespass brought by the defendant in error, hereinafter referred to as the Argonaut Company, against the plaintiff in error, hereinafter referred to as the Kennedy Company, to recover damages for the wrongful extraction and conversion of gold-bearing ore from an underground segment of a vein alleged to be the property of the Argonaut Mining Company, and for the equitable relief of injunction restraining future trespasses. The case was tried upon an agreed statement. The facts of the case are simple, and may be succinctly stated by reference to the accompanying plat, which is a reproduction in miniature of the agreed map, Exhibit A, appearing opposite page 34 of the record.

The Argonaut Mining Company is the owner of the Pioneer or Argonaut Quartz Mine, Lot 48. The claim was located prior to the passage of the General Mining Act of May 10, 1872. Patent was applied for under the previous Act of July 26, 1866, and final entry and payment were made and certificate of purchase was issued February 23, 1872. Patent issued August 12, 1872, and contains the following granting clause:—

"Now Know Ye, that the United States of America " in consideration of the premises and in conformity with " the said Acts of Congress, HAVE GIVEN AND GRANTED, " and by these presents do give and grant, unto the said " Pioneer Gold and Silver Mining Company and to their " successors and assigns the said mining premises here- " before described at lot number forty-eight (48) embrac- " ing a portion of the northeast quarter of section twenty " (20) in Township Six (6) north of Range eleven (11) " east, Mt. Diablo Meridian, with the exclusive right of " possession and enjoyment of all the land included " within the exterior lines of said survey not herein " expressly excepted from these presents, and of fifteen " hundred and eighty-nine and 94-100 linear feet of said " Pioneer Quartz vein, lode, ledge or deposit as herein- " before described throughout its entire depth, although " it may enter the land adjoining, and of all the veins, " lodes, ledges or deposits throughout their entire depth, " the tops or apexes of which lie inside the exterior " boundary lines of said survey at the surface extended " downward vertically, although such veins, lodes, ledges " or deposits in their downward course may so far depart " from a perpendicular as to extend outside the vertical " side-lines of said survey;

" Provided that the right of possession hereby granted " to such outside parts of said veins, lodes, ledges or " deposits shall be confined to such portions thereof as " lie between vertical planes drawn downward through " the end lines of said survey at the surface so continued

" in their own direction that such vertical planes will " intersect such exterior parts of said veins, lodes, ledges " or deposits."

The Kennedy Company, plaintiff in error, owns the Kennedy Mine, Lot No. 44, which was located and entered for patent prior to May 10, 1872. The Kennedy Company asserts no title under it to any of the ore bodies in dispute, and for the purpose of the pending discussion it is a non-essential and immaterial factor, to be referred to only incidentally.

The Kennedy Company also owns the Silva Quartz Mine, Lot 86, its title resting on an entry made in October, 1892, twenty years later than the patent entry of the Pioneer or Argonaut.

With reference to the Pioneer and Kennedy mines the Argonaut and Kennedy Companies are co-terminous mining proprietors upon the same vein or lode, the top or apex of which passes through the Pioneer or Argonaut into the Kennedy. The common end line boundary is the line A–B on Exhibit A, crossing the lode at the point Z. The line A–B–B′ is the end line produced indefinitely in the direction of the dip or downward course of the vein.

Both parties have sunk working shafts the mouths or openings of which do not start at the outcrop or apex, but in front or to the east of it, each intersecting the vein, however, in depth, and all the workings of both parties to this litigation, so far as the ore bodies in controversy are concerned, are on this vein.

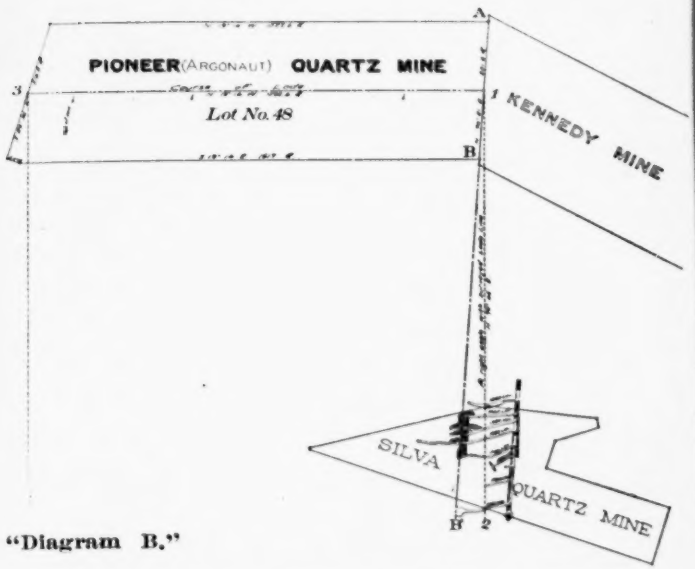
The vein on its dip or downward course passes underneath the Silva Quartz Mine belonging to the Kennedy

Company. The Silva was located and patented under the Act of 1872, on another vein having its top or apex within said Silva ground. The patent for the claim is shown in the record, at p. 31 and contains the following reservation :—

" First.—That the premises hereby granted with the " exception of the surface may be entered by the prop- " rietor of any other vein, lode or ledge the top or apex " of which lies outside the boundary of said granted " premises, should the same on its depth be found to " penetrate, intersect or extend into said premises, for " the purpose of extracting and removing the ore from " such other vein, lode or ledge."

The Kennedy Company, by means of drifts, levels and stopes extended southerly on the vein from its main working shaft, having its collar within the Kennedy Mine, crossed the extended common end line A–B–B′, and extracted the ore from the Pioneer vein, which ore was, however, vertically underneath the surface of the Silva.

The following diagram "B" will simplify the situation as it was dealt with by the Supreme Court of California :—



"Diagram B."

The end line A–B is practically at right angles to the general strike of the vein as it traverses the Pioneer location. Mathematically stated, the course of the vein as agreed upon is S. 19° 14′ E. or N. 19° 14′ W. (Par. XXI. Agreed Statement of Facts, Record, p. 29.) A course at right angles to this would be N. 70° 45′ E. as indicated by the line 1–2 on Diagram B. The line A–B therefore, with reference to the general course of the vein through the Pioneer location, considered in relation to the direction of the dip, forms an angle which is less than a right angle.

The southerly end line of the Pioneer or Argonaut with reference to the general course of the vein is somewhat greater than a right angle, and the two end lines diverge in the direction of the dip. The line 3–4 on

Diagram B is a line drawn from the southern extremity of the lode within the Pioneer or Argonaut claim and at right angles to the general course of the vein through that claim.

To summarize the situation, the Pioneer or Argonaut claim was located prior to or under the Act of July 26, 1866, and was entered for patent under that Act. Its end lines are not parallel, but diverge in the direction of the dip.

The ore bodies in dispute are on the Pioneer vein within planes drawn at right angles to the course of the vein within the location, and are within the extended end line planes of the Pioneer or Argonaut claim as defined in the patent. They are vertically underneath the surface of the Silva Quartz Mine, and are claimed by its owner, the Kennedy Company, as a common law incident of its ownership of the Silva Claim, and by reason of the non-parallelism of the Pioneer or Argonaut end lines.

The net value of the ore extracted by the Kennedy Company south of the line A–B–B′ and within the end line planes above described, after allowing for cost of extracting and reduction, was fixed by agreement at $56,099.95. The trial court gave judgment for the Argonaut Company for this amount, with interest from the date of the agreed statement. The Supreme Court of California sitting in banc affirmed the judgment.

We may epitomize the grounds of affirmance as gleaned from a reading of the opinion, which appears in full in the record, which has been printed by defendant in error

for the purpose of this motion (see Record, pp. 74–83), as follows:—

(1) Under the Act of July 26, 1866, under which the Argonaut or Pioneer was located, surveyed and entered for patent, the end lines of a location were not required to be parallel. That the sanction for this rule is found in repeated decisions of the Supreme Court of the United States.

(2) The Act of 1872, in which for the first time end lines of a location were required to be parallel, did not deprive a locator under the prior law of any rights acquired thereunder.

(3) The ore bodies in dispute are within the extended end line planes of the Pioneer or Argonaut, and are within vertical planes drawn through lines at right angles to the general course or strike of the vein applied at the extremities of the lode within the location. They are therefore the property of the Argonaut Company, and are no part of the Silva Quartz Mine claimed by the Kennedy Company. That this necessarily follows from the application of the principles announced by the Supreme Court of the United States in analagous cases.

The alleged "Federal Question" and the manner in which it was presented to the courts below by plaintiff in error will be outlined at the opening of the argument which follows.

Defendant in error now moves the Court to dismiss the writ of error for lack of jurisdiction, or to affirm the judgment upon the following grounds:—

FIRST. It is manifest that even if this Court has jurisdiction the question on which jurisdiction depends is so frivolous as not to require further argument.

SECOND. The so-called federal question alleged to be involved in the action was decided by the Supreme Court of California in accordance with the prior decisions of this Court.

THIRD. The decision of the Supreme Court of California is obviously correct, and could not have been otherwise upon the record presented.

FOURTH. Said writ of error was manifestly sued out for delay only.

In support of this motion we urge the following

POINTS AND AUTHORITIES.

I.

AS TO THE ALLEGED FEDERAL QUESTION AND THE MANNER OF ITS PRESENTATION TO THE COURTS BELOW.

There is no federal question stated upon the face of the complaint. The mere allegation of ownership of the mine and vein, and the trespass thereon, although the necessary inference is that title was derived through some act of Congress, does not suggest a federal question.

"It is well settled that a suit to enforce a right which "takes its origin in the laws of the United States is not "necessarily one arising under the Constitution or laws "of the United States, within the meaning of the juris-

" diction clauses, for if it did every action to establish " title to real estate (at least in the newer States) would " be such a one, as all titles in those States come from " the United States or by virtue of its laws."

Shoshone Mining Company v. *Rutter*, 177 U. S. 505, 507.

The answer in the case admits many of the facts alleged in the complaint, but denies the allegation of ownership of that part of the vein which is outside of and beyond the vertical plane drawn through the east side line of the Pioneer or Argonaut claim and upon which the trespass was committed. No right or title under any federal law is set up by the Kennedy Company. It does not plead the ownership of the Silva or anything else. It contents itself with the mere denial of plaintiff's rights.

The first assertion of a "Federal Question" in terms by the Kennedy Company before the trial court appears as a climax to a series of twenty-three objections to the consideration by the trial court of certain of the facts appearing in the agreed statement.

We quote from the record, page 54:

"And this defendant specially sets up and claims " that, in the decision of all and singular each and every " the questions raised by those of the foregoing objec- " tions which relate to the right and title asserted by " plaintiff to the ores in question by reason of its owner- " ship of the Pioneer Quartz Mine, Lot No. 48, as well " as in the decision of all and singular each and every " the questions raised by those of the foregoing objec- " tions which relate to the right and title asserted by " defendant to said ores by reason of its ownership of the " Silva Quartz Mine, Lot No. 86, is involved: First,

" the construction of the Act of Congress of the United " States, approved May 10, 1872, entitled 'An Act to " 'promote the development of the Mining Resources " 'of the United States,' under the provisions of which " plaintiff acquired its title to said Lot No. 48; " and, second, the construction of Chapter Six of Title " Thirty-two of the Revised Statutes of the United " States and legislation supplemental thereto, under the " provisions of which defendant acquired its title to said " Lot No. 86.

"And all and singular each and every of such objec- " tions are so specially set up and claimed by defend- " ant so as to apprise the court that the Federal " Questions so involved are presented for its considera- " tion and decision."

We may here remark parenthetically, as to these numerous objections, that the reception by the trial court of immaterial and incompetent evidence in no sense involves a federal question of which this Court will take cognizance.

" This court has no jurisdiction to consider and revise " the decision of a state court, however erroneous it may " be in admitting the evidence to establish the fact. But " when evidence is admitted as competent for this " purpose, and it is sought to give it effect for other pur- " poses which do involve questions giving the court " jurisdiction, then the decisions of state courts on the " effect of such evidence may be fully considered here, " and their judgments reversed or affirmed, in a similar " manner as if a like question had arisen in a Supreme " Court of error of a State, when reversing the proceed- " ings of inferior courts of original jurisdiction."

Dower v. *Richards*, 151 U. S. 658, 667;
Quoting from *Mackay* v. *Dillon*, 4 How. 421, 447.

The Supreme Court of California not only declined to give effect to the evidence considered by the trial court

over the Kennedy Company's objection, but held tentatively that the facts objected to were not material. The Court in its opinion makes use of the following language in this behalf, speaking through Justice Temple:—

"The cause was submitted in the trial court upon an "agreed statement of facts, each party having the "right to object to the relevancy, competency and mater- "riality of any part of it. Certain objections to evidence "were made by the appellant, which were overruled by "the court, and the main argument here has been in "regard to these rulings. Much of the evidenee was "objected to simply upon the ground of immateriality. "All that I deem it necessary to say in regard to such "rulings is that, admitting that the trial court erred, as "I am inclined to think it did, defendant has suffered no "harm. The question of law upon which the case must "turn is not changed or affected by receiving this imma- "terial evidence."

Record, p. 74.

Of the twenty-six errors now assigned and relied upon in this Court to reverse the judgment of the Supreme Court of California, twenty of them are the errors committed by the *trial* court in considering the facts objected to, which facts the appellate court rejected in reaching its conclusions. This class of objections and rulings to which is appended the assertion of "Federal Question", heretofore quoted, are entirely eliminated from the case by the action of the Supreme Court of California.

The Kennedy Company in the statement of the "Federal Question" asserted that there was involved the construction of the Act of Congress of May 10, 1872, "under the provisions of which plaintiff acquired its "title to said Lot 48 (the Pioneer); and second, the

" construction of Chapter 6 of Title 32 of the Revised " Statutes, and legislation supplemental thereto, under " the provisions of which defendant acquired the title to " said lot No. 86 (the Silva)."

The attention of the Court is nowhere specially directed to any other Act of Congress. The length and breadth of the " Federal Question " wherever it was suggested or presented by the Kennedy Company and urged upon the trial court was the construction of the Act of 1872 and the Revised Statutes which embody that act. With this in view we submit the following criticisms:—

1. It is not shown by the record that there was any controversy over the construction of the Act of 1872, as applied to the rights of the respective parties. Or, if there was a controversy, what construction would be favorable and what unfavorable to the Kennedy Company. Locations made under the Act of 1872 were required to have parallel end lines as a condition precedent to the enjoyment of the extralateral right. There is no room for controversy over this. Neither party denies it.

2. The Kennedy Company's statement of " Federal Question " contains a false premise. The title to the Pioneer or Argonaut Mine was not acquired under the Act of 1872. It was located, surveyed for patent, entered, paid for, and certificate of purchase issued several months before the Act of 1872 was passed, and twenty years before the Silva was located. The title was *acquired* under the Act of July, 1866. After the issuance of the certificate of purchase the government held the title in trust for the benefit of the entryman.

The certificate of purchase was the equivalent of a patent.

Benson Mining Company v. *Alta M. Co.*, 145 U. S. 428, 431–432;
Stark v. *Starr*, 6 Wall. 402;
Carroll v. *Safford*, 3 How. 441;
Wirth v. *Branson*, 98 U. S. 118.

The patent to the Pioneer was, it is true, not actually issued until after the Act of May 10, 1872, but it recites the entry made in February of that year, and that it was issued in conformity with the Act of July 26, 1866, as well as by authority of the Act of 1872.

(Record, p. 25.)

Section 9 of the Act of 1872 provided for the repeal of most of the sections of the Act of 1866, but specially preserved existing rights.

Section 2328, Revised Statutes.

Section 12 provides as follows: "Nor shall this act affect any right acquired under said act."

Section 16 contains the following proviso: "that nothing contained in this act shall be construed to impair in any way rights or interests in mining property acquired under existing laws."

As was said by Judge Field in the Eureka case (4 Sawy. 323), speaking of locations patented after the passage of the Act of 1872, but located prior thereto:—

"The Act of 1872 preserves to the miner the rights acquired under the Act of 1866, and confers additional rights."

The patent to the Pioneer confirmed the pre-existing rights acquired under the Act of 1866, viz., Pioneer Lode, and granted the additional rights,—i. e., all other lodes having their tops or apices within the surface boundaries.

We must conclude therefore that the rights of the plaintiff are to be determined, so far as the lode in question is concerned, by the Act of 1866—an act which the Kennedy Company wholly ignores in its statement of the "Federal Question."

If the ore bodies in dispute passed to the Argonaut Company under the Act of 1866, there is no possible rule of construction which could be applied to the Act of 1872 which would give them to the Kennedy Company. If there is any federal question before the Court it is not the one relied upon by the Kennedy Company. It pertains solely to the proper construction of the Act of July 26, 1866. It does not appear from the record that the Act of 1872 has been construed so as to deprive the Kennedy Company of anything granted to it by the act. This controversy does not affect the surface of the Silva or any vein which has its top or apex therein, which is *all* the Act of 1872 purports to grant. As was said by the Supreme Court of California :—

"Defendant asserts title to the ore by reason of its "ownership of the Silva ground under what he calls "the common law right to everything beneath the sur- "face."

Opinion, Record, p. 75.

In other words, under the Act of 1872 the Kennedy Company was granted the Silva surface, and all lodes

having their tops or apices therein. The ore bodies are claimed under the common law presumption that he who owns the surface owns everything beneath it. We submit that what are the common law incidents of ownership of a tract of land conveyed by the government is not a matter of federal cognizance.

The state courts are the exclusive judges of what the common law is, and of what common law rules of property are to be applied to federal grants of property within the state.

"Section 709 of the Revised Statutes points out the "cases in which the judgment or decree of the highest "court of a State in which a decision could be had may "be reviewed by the Supreme Court of the United "States."

McKenna v. *Simpson*, 129 U. S. 506, 510.

Plaintiff in error has not brought itself within any of the designated classes.

This Court has no jurisdiction to review a judgment of the highest court of a state unless a federal question has been either in express terms or by necessary effect decided by that court against plaintiff in error. The Kennedy Company claimed title under a location made under the Act of 1872. Its contention was that the Act of 1872 required parallelism of end lines as a condition precedent to the exercise of the extralateral right. The Court agreed with it, but held that the Pioneer or Argonaut title was acquired under the Act of 1866—a law which did not require parallelism of end lines. Plaintiff in error nowhere in the record contends that under the Act of 1866 end lines were required to be parallel, nor

does it complain that either the trial or State Supreme Court misconstrued the Act of 1866.

We respectfully submit that the writ of error should be dismissed.

II.

EVEN IF THIS COURT HAS JURISDICTION, THE JUDGMENT SHOULD BE AFFIRMED. THE ALLEGED FEDERAL QUESTION INVOLVED IN THE ACTION WAS DECIDED BY THE SUPREME COURT OF CALIFORNIA IN ACCORDANCE WITH THE PRIOR DECISIONS OF THIS COURT, IS OBVIOUSLY CORRECT AND COULD NOT HAVE BEEN OTHERWISE DECIDED UPON THE RECORD PRESENTED.

We are not unmindful of the fact that this Court does not look with favor upon motions to affirm coupled with motions to dismiss, where upon a consideration of the record it reaches a conclusion that a federal question is involved and was properly raised in the court below, and that it is customary when such conclusion is reached to postpone further consideration of the motion to affirm until the case is reached for argument on the merits. While we have heretofore urged upon the Court the lack of its jurisdiction in this case, have moved for a dismissal of the writ of error, and have faith in the correctness of our position, it is possible that the Court may be disinclined to adopt our views in that behalf expressed. In view of such an event, we are encouraged by several well considered opinions of this Court involving the proper practice in cases of this character, to present our motion to affirm, as an alternative.

In *Swope* v. *Leffingwell*, 105 U. S. 3, error to the Supreme Court of Missouri, this Court said :—

"We have jurisdiction of this case. The motion to "dismiss is, therefore, denied; but as the only Federal "question presented on the merits was decided by the "court below in accordance with our rulings in *National* "*Bank* v. *Mathews*, 98 U. S. 621, and *National Bank* v. "*Whitney*, 103 *Id.* 99, the motion to affirm is *granted*."

This rule was applied in

Chanute City v. *Trader*, 132 U. S. 210;

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232.

In *Richardson* v. *Louisville, etc., R. R. Co.*, 169 U. S. 128, 132, the "Federal Question" was practically conceded, yet this Court said with regard to the action of the State Court that its "ruling was so obviously correct that we "do not feel constrained to retain the case for further "argument."

Suppose that a cause were now pending before this Court on writ of error from a state court, involving solely the question determined in the case of *Del Monte Mining and Milling Company* v. *Last Chance*, 171 U. S. 55, viz., "May any of the lines of a junior lode location "be laid within, upon or across the surface of a valid "senior location for the purpose of defining for or secur-"ing to such junior location underground or extralateral "rights not in conflict with any rights of the senior "location?" and the decision of the State Court followed the decision of this Court. Would this Court feel constrained to retain the case for argument on its merits, incurring a delay of not less than a year and

perhaps two years, when it is made manifest on the motion to affirm that there is but one way in which the question could be answered?

In the abstract a question may be federal in its nature, yet when it has once become settled by decisions of this Court, it is no longer such a question as may be invoked in later cases for the purpose of affording defeated litigants an opportunity to prolong a controversy and delay the termination of the litigation. It ceases practically to be a federal question.

As was said by Justice Brewer, sitting at Circuit:—

"Where a proposition has once been decided by the "Supreme Court it can no longer be said that in it "there remains a federal question. More correctly it "is said that there is no question, State or Federal. "This is the only fair starting point for a case like "this."

State of Kansas v. *Bradley*, 26 Fed. 289, 290.

See also—

Blue Bird M. Co. v. *Largey*, 49 Fed. 289, 291;
Montana O. P. Company v. *Boston & Montana*, 85 Fed. 867.

That the only question involved in the case at bar which partakes of a federal nature has been finally settled by this Court in its previous decisions does not, we think, admit of a doubt. The opinion of the Supreme Court of California, which by rule of Court is now made a part of the record, clearly shows that in rendering its decision it followed the previous decisions of the Supreme Court of the United States. It could not have decided otherwise without being amenable to the charge of judicial insubordination.

That this is true we think we can readily demonstrate, if any demonstration be necessary beyond the statements in the opinion.

It is conceded that the end lines of the Argonaut or Pioneer are not parallel. It is also conceded that the title to it originated under the Act of 1866, was surveyed for patent, final entry and payment made, and certificate of purchase issued under that act.

UNDER THE ACT OF 1866 PARALLELISM OF END LINES OF SURFACE LOCATIONS WAS NOT REQUIRED.

This doctrine was first announced by Judge Field in the Eureka case, 4 Sawy. 302, Federal cases No. 4548 from which we quote:—

"In the first place it does not appear upon what "locations the patents were issued. They may have "been and probably were issued upon locations made "under the Act of 1866 where such parallelism in the "end lines of surface locations was not required."

4 Sawy. 319.

This case will be further alluded to. It is the precise analogue of the case at bar.

The same distinguished jurist in the famous Horseshoe case, speaking for the Court said:—

"Under the Act of 1866 parallelism in the end lines "of a surface location was not required."

Iron S. M. Co. v. *Elgin M. & S. Co.*, 118 U. S. 196, 208.

In the Del Monte case this Court speaking through Mr. Justice Brewer said:—

"There is no inherent necessity that the end lines of "a mining claim should be parallel. Yet the statute" (Act of 1872) "has so specifically prescribed."

Del Monte Min. and Milling Company v. *Last Chance M. Co.*, 171 U. S. 55, 67.

From which the inference is irresistible that parallelism is not essential unless the statute so declares, which the Act of 1866 did not.

We find in the Del Monte case the following outline of the Act of 1866, and the object and function of surface lines of locations made under it.

"Obviously the statute contemplated the patenting "of a certain number of feet of the particular vein "claimed by the locator, no matter how irregular its "course, made no provision as to the surface area or the "form of the surface location, leaving the Land Depart- "ment in each particular case to grant so much of the "surface as was 'fixed by local rules,' or was in the "absence of such rules in its judgment necessary for "the convenient working of the mine. The party to "whom the vein was thus patented was permitted to fol- "low it on its dip to any extent, although thereby passing "underneath lands to which the owner of the vein had "no title. As might be expected, the patents issued "under this statute described surface areas very different "and sometimes irregular in form."

171 U. S. 55, 63.

We find in this a distinct recognition of the rule announced in the Eureka case, that parallelism of surface lines of a location under the Act of 1866, was not essential to the right of following the vein on its dip.

Walrath v. *Champion M. Co.*, 171 U. S. 293, impliedly at least, sanctions the rule.

The same principle has been frequently followed in the Circuit Courts and Circuit Court of Appeals.

Walrath v. *Champion M. Co.*, 63 Fed. 552, 556;
Con. Wyoming v. *Champion*, 63 Fed. 540, 550;
Carson City G. & S. M. Co. v. *North Star M. Co.*, 73 Fed. 597, 599;
S. C. on appeal, 83 Fed. 658, 669;
Certiorari denied by U. S. Sup. Ct., 171 U. S. 687.

Judge Hawley speaking for the Circuit Court of Appeals, in the case last cited said:—

"The Act of 1866 *under the provisions of which the "patent in this case was applied for*, and under which "the rights of defendant in error accrued, did not require "parallelism of end lines."
83 Fed. 669.

So much for the abstract proposition that end lines of a surface location under the Act of 1866 were not required to be parallel.

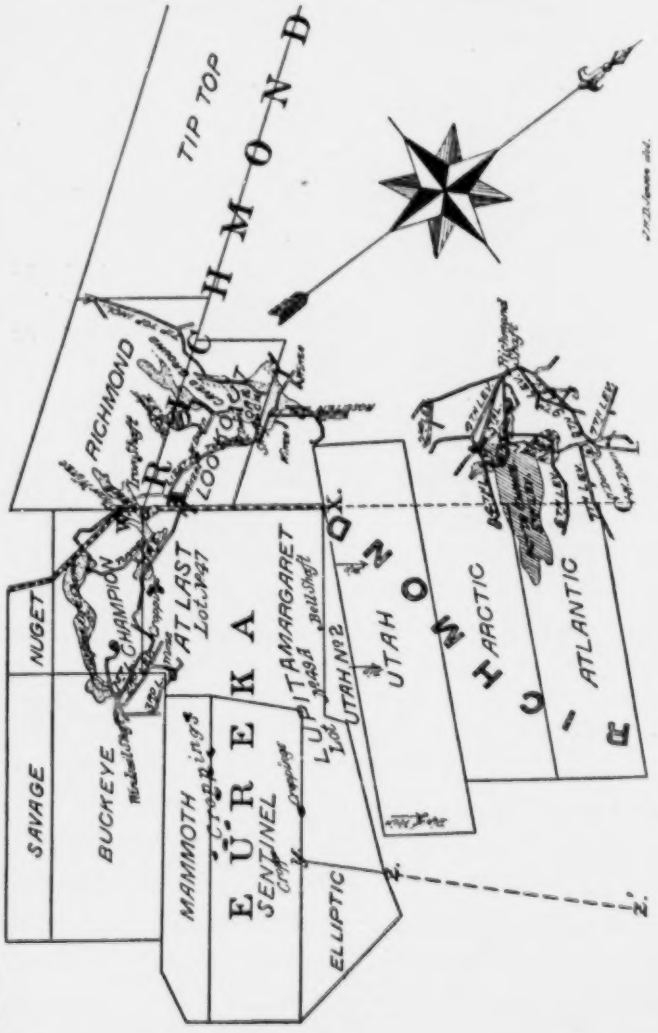
As to the application of the rule to cases similar to the one at bar, we present the Eureka case as it was presented to the Circuit Court and passed upon by the Supreme Court of the United States.

THE EUREKA CASE AND ITS RESEMBLANCE TO THE CASE AT BAR.

Accompanying the decision of the Circuit Court (4 Sawy. 302) of this famous case, is a diagram which represents its principal features. From this and the original exhibits used at the trial and for the purpose of presenting the Argonaut–Kennedy case to the State courts, we prepared a map, upon which is delineated such

physical features as will explain the precise questions involved, and will illustrate the striking similarity between the two cases.

This we herewith reproduce in miniature.



This figure is practically a reproduction of Exhibit "U" attached to the findings and judgment roll in the Eureka case.

The Richmond Company owned the Richmond, Tip Top, and Lookout claims, lying northwesterly of the line W–X, and the Eureka owned the Nugget, Champion, At Last, and Lupita, or Margaret, southeasterly of that line. This line W–X was a common boundary between the two companies. The ore body in dispute was the "Potts Chamber," which was bisected by a vertical plane drawn through the common boundary, W–X, and that line produced in the direction of C. The end lines of the At Last and Lupita were not parallel, but *diverged* in the direction of the dip, as represented by the lines W–X–C, and Y–Z–Z^1. The Richmond Company also owned the Utah, Arctic, and Atlantic locations overlying the dip of the lode, and underneath the surface of which was found the ore body in dispute. As to the position of the top apex of the vein, a mere casual reading of Judge Field's opinion (4 Sawy. 302) shows the lode to have been quite a broad mineralized zone, having tops and apices in all the locations of the Eureka Company. If there was no apex in either the At Last or Lupita, the question of non-parallelism of end lines could not have been injected into the case, as the end lines of the Champion were parallel.

One of the main contentions of the Richmond Company was that the end lines of the At Last and Lupita, belonging to the Eureka, were not parallel, as required by the Act of 1872. Therefore, the Eureka could not

follow the lode outside of its vertical side boundary. As a corollary to this, the Richmond was entitled to the ore bodies in dispute, because they were underneath the surface of the Utah, Arctic, and Atlantic, which belonged to the Richmond Company.

It does not require any great power of discernment, or faculty of analysis, to appreciate the absolute similarity between the facts of the Eureka-Richmond case and the Argonaut-Kennedy case.

When we compare the chronology of the two cases, we find that Judge Field in his opinion (4 Sawy. 319) says that it did not appear when the Eureka locations were made. He *assumed* they were made under the Act of 1866. There was a deed in evidence executed by the Eureka Company to the Richmond Company dated April 26, 1871, which recited the ownership by the Eureka Company of the Champion, At Last, and Margaret (Lupita) claims, which made the inference conclusive that they were located prior to that date,—i. e., under the Act of 1866.

Speaking of this, the Supreme Court of the United States said in its opinion affirming the judgment:—

"The Eureka Company at some time *before April 26, 1871*, but at what precise date does not appear, became "the owner of the Champion, At Last, and Margaret "(Lupita) claims."

Richmond v. *Eureka*, 103 U. S. 839, 841.

There is no room for ambiguity or infereuce as to when the Pioneer or Argonaut was acquired. It had passed to entry under the Act of 1866, and this fact appears on the face of the patent.

With reference to the position of the ore bodies in dispute in the Eureka case, the facts were found by the trial Court as follows:—

"17th. That the mining ground in dispute is situ-
"ated within the lode or ledge as hereinbefore described,
"and within planes drawn vertically down through the
"end lines of the plaintiff's patented location of the
"Champion claim, and within planes drawn vertically
"down through the extreme points of the patented loca-
"tions of the At Last and the Lupita or Margaret
"claims at right angles to the course or strike of the
"said lode or ledge and produced so as to follow the
"dip of the lode. The top or apex of said lode is within
"the surface lines of said patents to the plaintiff, and
"said lode dips at right angles to its course and on
"such dip extends under the surface of the Utah and
"Arctic claims of defendants."

This finding was undoubtedly made in order to apply the reasoning of Judge Field given in his opinion when speaking generally of end lines under local rules:—

"Lines drawn vertically down through the ledge or
"lode at right angles with a line representing this general
"course at the ends of the claimant's location will
"carve out, so to speak, a section of the ledge or lode
"within which he is permitted to work and out of which
"he cannot pass."

In awarding judgment in favor of the Eureka Company the trial court said:—

"Inasmuch as the ground in dispute lies within
"planes drawn vertically downward through the end
"lines of the plaintiff's (Eureka) patented locations, our
"conclusion is that the ground is the property of the
"plaintiff, and that judgment must be for its possession
"in its favor."

Eureka Case, 4 Sawy. at p. 325.

This judgment was affirmed by the Supreme Court of the United States, from whose opinion we select the following extracts:—

"The particular mining ground in dispute is situated "within the zone of limestone which has been described "and within planes drawn vertically down through the "end lines of the Champion Company as patented, and "within planes drawn vertically down through the ex- "treme points of the patented locations of the At Last "and Margaret claims at right angles to the course or "strike of the zone and produced so as to follow its dip."

"The top or apex of the zone is within the surface "lines of the patents to the Eureka Company, and the "zone dips at right angles to its course and on such dip "extends under the surface of the Arctic and Utah "claims. . . . The end lines of the surveys of the "At Last and Margaret (Lupita) claims as patented are "not parallel with each other."

Richmond v. *Eureka*, 103 U. S. 839, 844.

"The finding that the ground in dispute is within "the end lines and that the apex is within the surface "lines settles the rights of the parties between them- "selves *as well under their patents* as under their com- "promise agreement."

Id., p. 847.

In the case at bar the ore bodies in dispute occupy exactly the same position with reference to the properties of the parties litigant as those involved in the Eureka case. They are within planes drawn through the end lines of the Pioneer claim as patented and within planes drawn vertically down through the extreme points of the patented location at right angles to the course or strike of the vein and produced so as to follow its dip.

In the light of the decisions of this Court, it is impossible for us to conceive of any judgment which could

have been entered by the State court, except the one it has announced, unless it deliberately disregarded the rulings and decisions of this Court.

The decision by the Supreme Court of California was given in banc, and there is no dissent.

This writ of error was manifestly sued out for delay.

We respectfully urge that for the reasons hereinbefore set forth the writ of error should be dismissed, or in default of that the judgment should be affirmed.

Respectfully submitted,

CURTIS H. LINDLEY,

HENRY EICKHOFF,

Counsel for Defendant in Error.

[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Nos. 256 and 270.

THE KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error.

vs.

THE ARGONAUT MINING COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

The record in this cause was filed by defendant in error, and a motion was made therein to dismiss the writ of error or affirm the judgment. The number assigned to this on the present calendar is 256.

By direction of this Court further hearing of this motion was postponed until the case should be reached on its merits. Subsequently a second record was filed by plaintiff in error.

There is but one printed record, however, and that is the one numbered 256, the second printing of the record having been considered to be unnecessary. As we understand the rules and practice of this Court the motion to dismiss or affirm and the cause on its merits are to be presented when No. 256 is reached upon the calendar of this Court, that being the only proceeding in which the record is printed.

As to the motion to dismiss or affirm we respectfully invite the Court's attention to the brief in support of it presented in behalf of defendant in error and now on file. Without waiving this motion, but respectfully insisting thereon, the present brief will be limited to a discussion of the merits of the case as presented upon the writ of error.

ASSIGNMENTS OF ERROR.

The record contains twenty-six assignments of error.

Assignments I to XX are all of the same character and purport to be founded upon errors committed by the trial court in the admission or consideration by the court of certain facts which appeared in the agreed statement of facts upon which the case was tried, which action by the court below it is claimed was approved by the State Supreme Court. These assignments are all in the same form, *e. g.*:

> " At said trial the defendant specifically set forth, " made and claimed its objection to the admission or " consideration by the Court as evidence or as possessing " probative force herein of."
>
> [Then follows statement of the fact appearing in the agreed statement.]
>
> " The ruling of the Supreme Court upon said objection " and the affirmance of such ruling by the Supreme " Court are designated as an assignment of error upon " which plaintiff in error will rely for a reversal of the " decision and judgment herein."

We think that these assignments are readily eliminated from consideration.

The reception by the trial court of immaterial and irrelevant evidence in no sense involves a federal question of which this Court will take cognizance.

With reference to assignments of this character the rule has been announced by the Court as follows:

> "This Court has no jurisdiction to consider and revise "the decision of a state court, however erroneous it may "be in admitting the evidence to establish the fact. But "when evidence is admitted as competent for this pur- "pose, and it is sought to give it effect for other purposes "which do involve questions giving the Court juris- "diction, then the decisions of state courts on the effect "of such evidence may be fully considered here, and "their judgments reversed or affirmed, in a similar man- "ner as if a like question had arisen in a Supreme Court "of error of a State, when reversing the proceedings of "inferior courts of original jurisdiction."
>
> *Dower* v. *Richards*, 151 U. S. 658, 667;
> Quoting from *Mackay* v. *Dillon*, 4 How. 421, 447.

The Supreme Court of California not only declined to give effect to the evidence considered by the trial court over the Kennedy Company's objections, but held substantially that the facts objected to were not material and no substantial error was committed by the trial court in overruling the objections. The Court in its opinion makes use of the following language in this behalf, speaking through Justice Temple:

> "The cause was submitted in the trial Court upon an "agreed statement of facts, each party having the right to "to object to the relevancy, competency and materiality of "any part of it. Certain objections to evidence were made "by the appellant, which were overruled by the Court, "and the main argument here has been in regard to these "rulings. Much of the evidence was objected to simply "upon the ground of immateriality. All that I deem it "necessary to say in regard to such rulings is that, ad- "mitting that the trial court erred, as I am inclined to

" think it did, defendant has suffered no harm. The " question of law upon which the case must turn is not " changed or affected by receiving this immaterial evi- " dence."

Record, p. 74.

In the light of this statement of the Supreme Court of California, defining its attitude on the subject of the objections to the evidence and rulings made by the trial court thereon, we are at a loss to understand how plaintiff in error can assert a reliance upon an error which the Supreme Court of California did not commit.

If there had been involved before the State Supreme Court a "federal question" in its true sense it is quite manifest that the Court in its determination did not seek to give effect to any of the immaterial evidence. Therefore there is no assignable error as to the admission of such evidence.

Evidently counsel for plaintiff in error, after reprinting in full the twenty assignments, reached this conclusion, as their brief does not discuss a single one of them.

The "Appendix" to the brief, consisting of the argument of one of the counsel addressed to the trial court, does not, as to these assignments at least, challenge our attention as a discussion of errors committed by the Supreme Court of California which are the subject of the present investigation.

The remaining assignments of error attack the conclusions of law and the judgment of the trial court and its affirmance by the Supreme Court of California. They do not, in our judgment, demand detailed consideration. They simply involve the inquiry, Is the judgment which was affirmed by the Supreme Court of California erroneous?

STATEMENT OF THE CASE.

There is but little room for controversy as to the essential facts upon which the judgment in this cause ultimately and

necessarily rests. These facts are all embodied in an agreed statement forming part of the judgment roll. We are not content with the statement of the facts contained in the brief of plaintiff in error. We express our preference for our own method of presenting and correlating them as a basis for discussing the law.

For convenience we herewith reproduce as Figure 1 the map "Exhibit A," forming a part of the agreed statement of facts, appearing opposite page 34 of the printed record:

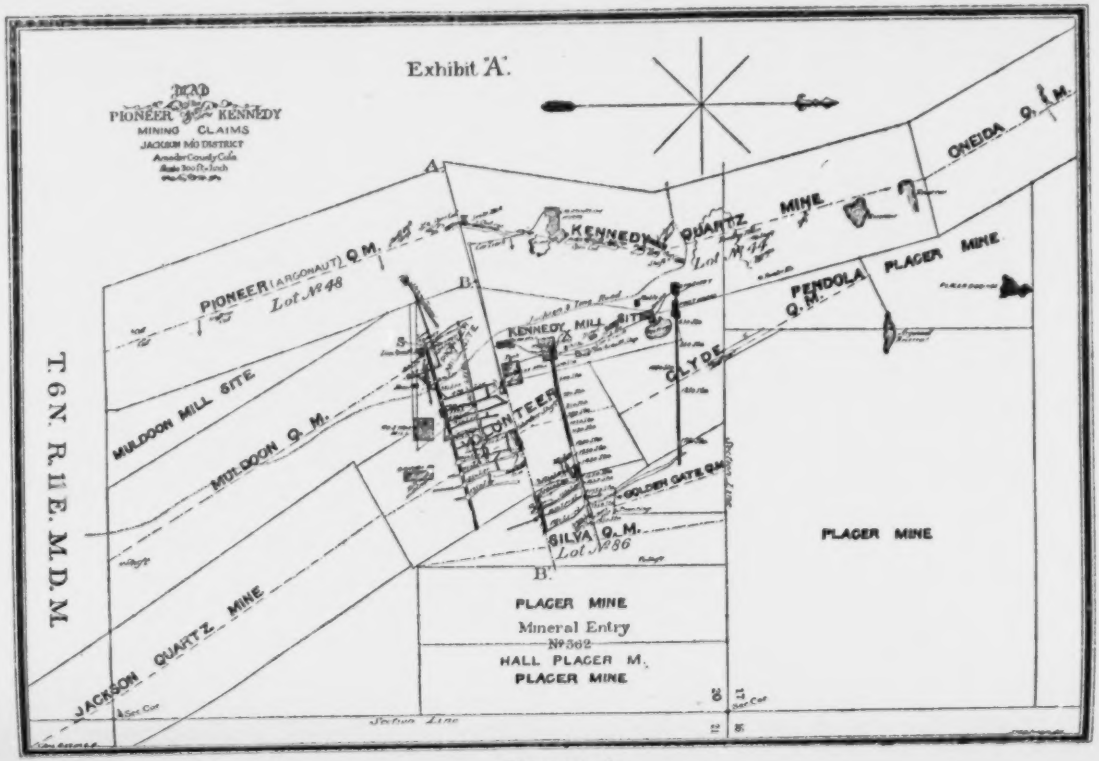


Exhibit A.
PIONEER KENNEDY
MINING CLAIMS
JACKSON MD DISTRICT
PIONEER (ARGONAUT) Q. M.
Lot №48
KENNEDY QUARTZ MINE
Lot №47
ONEIDA Q. M.
PENDOLA Q. M.
PLACER MINE
KENNEDY MILL SITE
CLYDE
VOLUNTEER
GOLDEN GATE Q.M.
MULDOON MILL SITE
MULDOON Q. M.
SILVA Q. M.
Lot №56
JACKSON QUARTZ MINE
PLACER MINE
Mineral Entry
№562
HALL PLACER M.
PLACER MINE
PLACER MINE
Section Line
T. 6 N. R. 11 E. M. D. M.
A
B
B'

6

The Facts.

The parties to this action are coterminous mining proprietors upon the same vein or lode, the top or apex of which passes through the Pioneer or Argonaut mine, belonging to Defendant in error, into the Kennedy mine, belonging to Plaintiff in error. The common boundary is the line A—B on "Exhibit A," crossing the lode at the point Z. The line A—B—B^1 is this end line produced indefinitely in the direction of the dip or downward course of the vein.

Both the Pioneer and Kennedy are patented. They were surveyed for patent by the same deputy mineral surveyor in 1871, and patents were applied for the same year. The Kennedy was finally entered and paid for in November, 1871, and patent issued July 29, 1872. The Pioneer was finally entered and paid for and certificate of purchase from the government issued February 23, 1872. Patent was issued in August following. During the pendency of the patent proceedings a conflict arose as to a segment of ground lying at the north end of the Pioneer and at the south end of the Kennedy. The Kennedy patent application was suspended awaiting the determination of the controversy.

PAR. VII., AGREED STATEMENT. Record, p. 14.

Subsequently an agreement was entered into between the then owners of the two properties, who were predecessors in title of the present litigants, by which the controversy was adjusted.

PAR. VIII., AGREED STATEMENT. Record, p. 15.

It is but fair to state that the trial court declined to consider this agreement as a factor in the case, and sustained the objection of plaintiff in error thereto. But it is in the case as a

fact. Whether any plausible argument may be legally deduced from it or not is a question we will not discuss at this juncture.

The essential fact, however, is that the end line A—B crosses the lode, and as between the Pioneer and Kennedy mines is a common end line.

Both parties have sunk working shafts, the mouths or openings of which do not start at the outcrop or apex, but in front or to the east of it, each intersecting the vein, however, in depth, and all the workings of both parties to this litigation, so far as the ore bodies in controversy are concerned, are on this vein.

PAR. XXIV., AGREED STATEMENT. Record, p. 30.

This vein on its dip or downward course passes underneath the Silva quartz mine, belonging to plaintiff in error, located and patented on another vein, which has its top or apex within said Silva ground.

This Silva quartz mine was patented to plaintiff in error February 6, 1893, which patent recites an entry made in October, 1892. This patent contains the following reservation:

> "FIRST: That the premises hereby granted, with the "exception of the surface, may be entered by the pro- "prietor of any other vein, lode, or ledge, the top or "apex of which lies outside of the boundary of said "granted premises, should the same in its dip be found "to penetrate, intersect, or extend into said premises, for "the purpose of extracting and removing the ore from "such other vein, lode, or ledge."
>
> Trans., fol. 191.

The ore extracted by plaintiff in error which is the subject of controversy, although taken from the Pioneer-Kennedy vein, was south of and beyond the Kennedy south-end boundary, and no right has been or can be predicated upon the

ownership by appellant of the Kennedy Mine. In this aspect, of the case the ownership by plaintiff in error of the Kennedy Mine is of no controlling legal force. Yet this fact of ownership, the conduct of plaintiff in error in extracting the ore, the manner of its extraction, its attitude as a coterminous mining proprietor, the relative situation of the properties and conduct of the two companies and their respective predecessors in title, are parts of the *res gestæ*, and essential to a proper understanding of the case in all its lights and shadows.

The ultimate problems involved are few and simple.

The task of this Court is limited to the application of but few principles of law to a case where all the facts are conceded.

The case presented upon the pleadings and agreed statement of facts is, therefore, one where the proprietor of a patented mining claim, having within its boundaries the apex of a vein, insists upon its ownership of that vein throughout its entire depth, within vertical planes drawn through its end lines, and those lines produced indefinitely in the direction of the dip, as against its neighbor who owns a part of the apex of the same vein, the end line between them being a common one, but who has crossed beyond and out of the common end-line boundary and taken the ore, reduced it and applied the proceeds to its own use, asserting a right to do so by virtue of its ownership of another mining claim, held by a junior title, underneath the surface of which the vein penetrates. The legal aspects of the case may be briefly summarized:—

CONTENTION OF PLAINTIFF IN ERROR.

Plaintiff in error contends:—

(1) That *prima facie* as the owner of the Silva Quartz Mine, overlying the dip of the vein in controversy, and the ore bodies in dispute, it owns everything underneath the surface of that claim found anywhere within vertical planes drawn through the surface boundaries. That to overcome this *prima facie* presumption it devolves upon the defendant in error to show that by some grant to it from the Government the title to the underlying Pioneer vein has been segregated from the title to the overlying Silva surface.

(2) That the Pioneer Mine was purchased from the Government, entered and paid for prior to the passage of the Act of 1872—*i. e.*, under the Act of 1866; that this Act, inferentially at least, required end-lines to be parallel, as a condition precedent to the exercise of the extralateral right. The end-lines of the Pioneer are not parallel; therefore there is no extralateral right. As a corollary to this, the ore-bodies in dispute belong to the plaintiff in error as the proprietor of the overlying surface of the Silva, upon the common law presumption that he who owns the surface owns everything underneath it.

(3) That conceding for the purpose of argument that the Act of 1866 did not require end-lines to be parallel, the Act of 1872 made such parallelism an essential. This Act in this respect was retroactive, and the Pioneer owners were compelled to either surrender to the Government their complete equitable title, evidenced by their certificate of purchase, go into the field and reform their lines, or abandon all claim to any extralateral right.

Corollary same as above.

In both trial and appellate courts, plaintiff in error urged the following:—

(4) That if this lack of parallelism does not prevent the exercise of *all* extralateral right, as the Pioneer end-lines diverge, it is the duty of the Court to whet its judicial carving-knife and carve out a segment of the vein, which will rectify the divergence, practically making new end-lines; and so carve it that the ore bodies in dispute may fall *without* the judicially constructed north end-line and *within* the "common-law" incidents of ownership of the Silva Quartz Mine belonging to the Kennedy Company.

Corollary: Same as above.

In the brief of plaintiff in error we find no discussion of this last contention. Evidently it has been abandoned. Counsel certainly cannot expect us to search through the "Appendix" to their brief for an excuse to here controvert what they were pleased to say to the trial court on this subject.

CONTENTION OF DEFENDANT IN ERROR.

While protesting that no fair interpretation of the mining laws or the theories upon which they are framed would convey to a mining locator or patentee the *title* to any part of any vein which did not have some portion of its top or apex within the surface boundaries, we may concede that, as a matter of *presumption*, the owner of a mining claim, *prima facie*, owns everything underneath its surface, *usque ad orcum*, and that the burden is upon the outside apex proprietor, to show his right to penetrate underneath the surface of another claim overlying the dip of the vein. There have been thoughtful and well-considered opinions to the contrary,

Jones v. *Prospect Mt. Tunnel Co.*, 21 Nev. 339, 348;
Montana Co. Ltd. v. *Clark*, 42 Fed. 626, 630,

but we admit that the weight of authority casts the burden upon the outside apex proprietor.

Cheesemen v. *Hart*, 42 Fed. 98, 105;
Iron S. M. Co. v. *Campbell*, 17 Colo. 267;
Duggan v. *Davey*, 4 Dak. 110;
Bell v. *Skillicorn*, 6 New Mex. 399;
Leadville M. Co. v. *Fitzgerald*, 4 Morr. M. Rep. 380;
Doe v. *Waterloo M. Co.*, 54 Fed. 935, 937;
Cons. Wyoming v. *Champion M. Co.*, 63 Fed. 540, 550;
Carson City G. & S. M. Co. v. *North Star M. Co.*, 83 Fed. 658, 663.

We maintain, however, that this presumption is one flowing from the common law, and such rights as are predicated on it are not referable to the laws of Congress, and that a denial by a state court of an asserted common-law right is not subject to review in this Court. We have advanced this view in our briefs filed in support of our motion to dismiss or affirm.

Without waiving this contention we may concede that the burden was upon defendant in error to establish his rights to the ore bodies in dispute underneath the Silva surface—that is, it was called upon to overcome the *prima facie* presumption flowing from the surface ownership. With this preliminary statement, the contention of defendant in error as presented to the courts below may be outlined.

I.

The title of the Argonaut Company to the Pioneer or Argonaut mine originated, ripened, and became vested in its predecessors under the Act of July 26, 1866. This Act did not, either in terms or inferentially, require end-lines to be

parallel, and no consequence is attached to a deviation from parallelism. This rule has been announced repeatedly by this Supreme Court of the United States; it is no longer an open question.

II.

Although the end lines were not required to be parallel under the Act of 1866, yet if by any process of reasoning any limitation upon the extralateral right were imposed upon the locator's title, by reason of the divergence of the end lines, such limitation was removed by the Act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end line planes of such location as it then existed.

III.

The title evidenced by the certificate of purchase, issued prior to the passage of the Act of 1872, was the complete equitable title, equivalent for all practical purposes to the issuance of a patent. Congress could not deprive the purchaser of any rights acquired under that certificate, nor cast upon such purchaser any additional burdens. It is quite manifest, however, that Congress never intended that the estate of any mining locator, held prior to May 10, 1872, should suffer any diminution or curtailment by reason of the Act passed on that day.

IV.

The patent of the United States issued to the predecessor in title of the Argonaut Company in terms grants the vein throughout its entire depth, between the end lines described in the patent, and these lines extended in their own direction. The Land Department had jurisdiction of the subject-matter. If more was given than the patentee should have had, it is a question between the government and the patentee; outsiders cannot collaterally assail the patent.

V.

The courts cannot construct end lines. The end lines described in a patent issued by the executive cannot be readjusted by the judiciary. The extralateral rights of the Pioneer must be determined by the calls of the patent in connection with the law under which the right to it became perfected, and the physical facts as to the course of the vein through the ground.

VI.

If this be not true, the only method for adjusting inequalities for which any judicial precedent can be found, is announced in the Eureka case—*i. e.*, lines drawn at right angles to the course of the vein—at the extreme points on the vein within the location. The application of this theory will give all the ore bodies in dispute (and more) to the Argonaut Company.

VII.

The Kennedy Mining and Milling Company, by reason of its acts and conduct, and that of its predecessors in title, are estopped from asserting that the Argonaut Mining Company has no extralateral right in the vein in dispute.

These are substantially the contentions presented to the trial and appellate courts, and are those which will be urged here.

The Decisions of the Courts Below.

The opinion of the trial court is not a part of the record here. We print it as an appendix to this brief. It contains a clear statement of the case and a logical analysis and application of the law to the facts. An inspection of this opinion indicates that the conclusions of law and judgment were based upon the following principles:

(1) The owners of the Pioneer having entered and paid for their claim and received from the Government a certificate of purchase prior to the passage of the Act of 1872, the extralateral rights pertaining to the claim must be determined under the Act of July 26, 1866. The Act of 1872 was confirmatory of these rights.

(2) Under the Act of 1866 end-lines were not required to be parallel, and the non-parallelism of such lines of the Pioneer did not deprive the owners of that claim of any extralateral right.

(3) Under the doctrine of the Eureka case (4 Sawy. 302) as affirmed by the Supreme Court of the United States (103 U. S., 839) the ore bodies in dispute are within the extralateral rights of the Pioneer and belong to the Argonaut Company. They do not pertain to the Silva mine of the Kennedy Company.

In deciding the appeal from the judgment of the trial court, the Supreme Court of California practically eliminated all the factors in the case, save the respective patents and the stipulated facts as to the position of the vein and the *situs* of the ore bodies in dispute.

The Court's opinion is explained by reference to a diagram appearing opposite page 74 in the record, and which for convenient reference we herewith reproduce as figure 2:

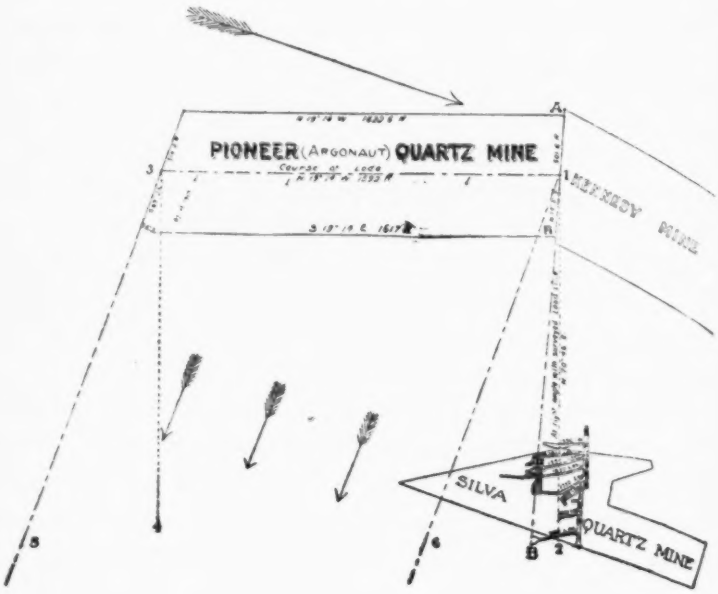


FIGURE 2.

The Court holds :

(1) That the Argonaut Company was entitled to all the rights which would attach under the Act of 1866 and to any additional rights which inured to such locations under the Act of 1872.

(2) The Act of 1866 did not require parallel end-lines, and the failure to so parallel them in the Pioneer location does not deprive that claim of extralateral rights.

(3) The extralateral rights on lodes located under the Act of 1866, where end-lines are not parallel, is to be defined, as suggested in the Eureka case, by drawing lines at right angles to the general course of the lode at the extreme points on the lode within the location.

The ore bodies in controversy are within the end-line planes of the Pioneer, and also within extralateral right planes constructed at right angles to the general course of the lode through the extreme points on the lode within the location. Therefore, such ore bodies belong to the Argonaut Company.

(3) There is no law to support the contention of plaintiffs in error, that because the description in the Pioneer patent commences at the south end of the claim, and the south end-line was first run, the inequalities arising through diverging end-lines should be adjusted by drawing a produced line (1—6 in Figure 2) parallel to the produced south end-line (3—5).

Judgment of the Court below was affirmed.

The writ of error brings to this court the record considered by the Supreme Court of California, and necessarily the arguments here will follow the general lines of those presented to the Court below.

We respectfully submit the following points and authorities in support of our several contentions:

I.

The title of the Argonaut Mining Company to the Pioneer or Argonaut Mine originated, ripened and became vested under the Act of July 26, 1866. This Act did not, either in terms or inferentially, require end-lines to be parallel, and no consequence is attached to a deviation from such parallelism. This rule has been announced repeatedly by this Court and other tribunals. It is no longer an open question.

The genesis of the Argonaut Company's title, of necessity, antedated the passage of the Act of May 10, 1872.

It appears from the agreed statement of facts (Par. VI, Record, p. 14) that application for patent was filed in the Land Office at Sacramento, January 13, 1871. The precise date of the location of the claim upon which the application was based does not appear in the record; but as, under the congressional law then in force, commonly called the "Lode and Water Law," approved July 26, 1866, an application for patent could be predicated only on a claim to a vein or lode which had been previously occupied and improved (14 Stats. at Large, p. 251) it follows, necessarily, that the origin of the title antedated January 13, 1871.

It also appears from the record (Par. XV., Agreed Statement, Record, p. 25) that the patent proceeding culminated in final entry, payment of the purchase price and issuance of certificate of purchase, February 23, 1872, while the Act of 1866 was still in force. This act remained in full force until superseded by the Act of May 10, 1872.

Plaintiff in error objected before the trial court to the materiality and relevancy of these facts, urging that the patent was the measure of our rights, and that antecedent steps taken in

the patent proceeding were not to be considered. This proposition would undoubtedly be true if those facts were introduced for the purpose of either limiting or enlarging the scope of the patent, or varying or modifying its terms. Such, however, was not the object; nor were such facts considered by the court below for any purpose other than to show the *date to which the title derived through the patent relates.* For this purpose the evidence was perfectly legitimate and proper.

It is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inauguration of the right; that is, to the location on which the patent proceeding is based.

Heydenfeldt vs. *Daney G. & S. M. Co.*, 93 U. S. 634, 641;
St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636, 647;
Deffeback vs. *Hawke*, 115 U. S. 392, 405;
Jacob vs. *Lorenz*, 98 Cal. 332, 340;
Silver Bow M. & M. Co. vs. *Clark*, 5 Mont. 378, 422;
Talbott vs. *King*, 7 Mont. 66, 106;
Smoke House Lode Cases, 6 Mont. 397, 402;
Deno vs. *Griffin*, 20 Nev. 249, 252;
Eureka Case, 4 Sawy. 302, 317.

In cases of this character, for the purpose of showing the date to which the patent relates, evidence is admissible to prove proceedings under which the title originated.

St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636, 647;
Kahn vs. *Old Telegraph Co.*, 2 Utah, 174, 188.

Said this court, speaking through Justice Field:

"This doctrine, as to the conclusiveness of a patent, isnot inconsistent with the right of the patentee, often recognized by this Court, to show the date of the original proceeding for the acquisition of title, where it is not stated in the instrument,

as the patent is deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims."

St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636, 647.

The patent to the Pioneer mine recites the date of the final entry and payment, February 23, 1872.

Trans., fol. 150.

This of itself establishes the fact that the Pioneer title was perfected while the Act of 1866 was in full force, but, of course, fails to show any antecedent step in the inauguration of the right.

We are authorized, therefore, to state that on the face of the record the title of the Argonaut Company to the Pioneer mine is referable to the Act of 1866, and that this act is a muniment of the title of defendant in error. It remains for us to determine the underlying principles of the Act of 1866, the interpretation given to it by the courts, and apply the rules announced to the case at bar.

Underlying Principles of the Act of July 26, 1866.

A full text of the Act of July 26, 1866, is found in 14 U. S. Stats. at Large, p. 451.

This Act was but a crystallization of the miners' rules and customs, which, prior to congressional action, formed the Pacific Coast common law of mines.

Jennison vs. *Kirk*, 98 U. S. 453, 456;
Broder vs. *Natoma Water Co.*, 101 U. S. 274, 276;
Chambers vs. *Harrington*, 111 U. S. 350, 352;
N. P. R. R. vs. *Sanders*, 166 U. S. 620, 634.

Under the local rules, as well as under the Act of 1866, the lode was the principal thing, and the surface was, in reality, an incident.

Johnson vs. *Parks*, 10 Cal. 447, 449.

Patterson vs. *Hitchcock*, 3 Colo. 533, 534.

Wolfley vs. *Lebanon Min. Co.*, 4 Colo. 112, 116.

Walrath vs. *Champion M. Co.*, 63 Fed. 552, 556.

Upon this subject we may quote with profit from a recent decision of this Court, Justice Brewer speaking for the Court:

"The purpose herein (the Act of 1866) manifested was the conveyance of the vein, and not the conveyance of a certain area of land, within which was the vein. * * * Nowhere was there any express limitation as to the amount of land to be conveyed. * * * Obviously, the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area, or the form of the surface location, leaving the land department in each particular case to grant so much of the surface 'as was fixed by local rules,' or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine."

"As might be expected, the patents issued under this statute described surface areas very different, and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight, or in a curved irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules, giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area."

Del Monte M. and M. Co. vs. *Last Chance M. Co.* 171 U. S. 55, 64.

Justice Field, speaking for himself and the judges who participated with him in the trial of the Eureka case, said:

"It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or

lode, is, under the Act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course or to follow the dips, angles and variations of the vein, or control the direction he shall take."

Eureka Case, 4 Sawy. 302, 323.

We shall have occasion presently to critically analyze and discuss the Eureka case, as, in our judgment, it presents conditions absolutely parallel to the one at bar. Our present object is simply to note the general theories of the Act of 1866, and the evolution of the principles for which we are contending.

Under this Act, end-lines were implied in the sense that they determined the points beyond which the miner might not go in his pursuit of the vein on its strike.

Before patent, he might pursue it on its course or strike to the extent of the number of feet claimed. The notice of location usually called for so many feet on the vein, and a misdescription as to its course did not vitiate the location. The locator had a right, prior to patent, to follow it wherever it ran.

Johnson v. *Parks*, 10 Cal. 447, 449.

The locator could hold but one lode or vein.

Eclipse G. & S. M. Co. v. *Spring*, 59 Cal., 304, 305;

Eureka case, 4 Sawy., 302, 323;

Walrath v. *Champion M. Co.*, 63 Fed., 552;

S. C. on Appeal, 171 U. S. 293, 305;

Del Monte Min. & Mill. Co. v. *Last Chance Min. Co.*, 171 U. S. 55, 63.

In all patents issued under the Act, a recital was inserted, restricting the grant to the one vein or lode described therein, and providing that any other vein or lode discovered within the surface ground described should be excepted and excluded from the operation of the grant.

The nature of the grant authorized by this Act is defined in Section 2, which we quote:—

"And be it further enacted, that whenever any person, or association of persons, claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, having previously occupied and improved the same, according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and to enter such tract, and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining sha'l be sold subject to this condition."

It was under this Act that the predecessors in title located, applied and surveyed for patent the Pioneer Mine, and made final entry and payment to the Government.

Under the Act of 1866, Parallelism of End-Lines Not Required.

The end-lines of the Pioneer are not parallel, but diverge in the direction of the dip. For this reason plaintiff in error, as heretofore observed, insists that no extralateral right attaches to the Pioneer or Argonaut claim. In other words, counsel for plaintiff in error assert that under the Act of 1866, such parallelism was essential to the enjoyment of the right to follow the vein on its downward course outside of and beyond the vertical side boundaries. In the light of the adjudicated cases we cannot conceive how counsel can, with any degree of plausibility, make this assertion. A few excerpts

from the Court decisions will suffice to refute their contention on this point. We quote :

"In the first place, it does not appear upon what locations "the patents were issued. They may have been, and prob- "ably were, issued upon locations made under the Act of "1866, *where such parallelism in the end-lines of surface loca-* "*tions was not required.*"

Judge Field, in Eureka case, 4 Sawy. 302, 319 ;

Affirmed *Richmond M. Co.* vs. *Eureka M. Co.*, 103 U. S. 839-847.

"Under the Act of 1866 parallelism in the end-lines of a "surface location was not required."

Judge Field, in Iron Silver Mining Co. vs. *Elgin M. & S. Co.*, 118 U. S. 196, 208.

"Under the Act of 1866 parallelism of end-lines was not "required."

Walrath vs. *Champion Co.*, 63 Fed. 552, 556.

"The location was made under the law of 1866, which did "not require parallelism of end-lines."

Con. Wyoming G. M. Co. vs. *Champion M. Co.*, 63 Fed. 540, 550.

"When those locations were made (1866) there was no law "requiring such parallelism."

Carson City Gold and Silver Min. Co. vs. *North Star M. Co.*, 73 Fed. 597, 599.

"The Act of 1866, *under the provisions of which the patent* "*in this case was applied for*, and under which the rights of "defendant in error accrued, did not require parallelism of "end lines."

Carson City G. and S. M. Co. vs. *North Star M. Co.* (*C. C. A.*), 83 Fed. 658, 669;
Certiorari denied by U. S. Supreme Court, May, 1898.

The same doctrine was practically reiterated by this Court in a recent case. In speaking of the Act of 1872, which, in specific terms, required end lines to be parallel, Justice Brewer, for the Court, said:

"There is no inherent necessity that the end lines of a "mining claim should be parallel; yet the statute (Act of "1872) has so specifically prescribed."

Del Monte Min. & M. Co. vs. *Last Chance M. Co.*, 171 U. S. 55, 67.

From which the inference is irresistible that parallelism is not essential, unless the statute so declares, which the Act of 1866 did not.

As the doctrine so frequently announced had its origin in the exigencies of the Eureka case, it is expedient to present that case as it appeared to the eminent Judges who tried it, and to this Court before whom it was taken on appeal.

This will enable us to compare the facts and circumstances of that case with those of the case at bar.

The Eureka Case and Its Striking Resemblance to the Case at Bar.

Accompanying the decision of the Circuit Court in the Eureka case is a diagram which represents the principal features of it. From this and the original exhibits used at the trial, and for the purpose of presenting the Argonaut-Kennedy case to the trial judge, we prepared a map, upon which is delineated such physical features as will explain the precise questions involved and will illustrate the striking similarity between that case and the one at bar. This we herewith reproduce in miniature as "Figure 3."

This figure is practically a reproduction of "Exhibit U" attached to the findings and judgment-roll in the Eureka case.

FIGURE 3.

The Richmond Company owned the Richmond, Tip Top and Lookout claims, lying northwesterly of the line W–X, and the Eureka owned the Nugget, Champion, At Last and Lupita, or Margaret, southeasterly of that line. This line W–X was a common boundary between the two companies.

The ore body in dispute was the "Potts Chamber," which was bisected by a vertical plane drawn through the common boundary, W–X, and that line produced in the direction of C. The end lines of the At Last and Lupita were not parallel, but *diverged* in the direction of the dip, as represented by the lines W–X–C, and Y–Z–Z^1. The Richmond Company also owned the Utah, Arctic and Atlantic locations overlying the dip of the lode, and underneath the surface of which was found the ore body in dispute. As to the position of the top or apex of the vein, a mere casual reading of Judge Field's opinion (4 Sawy. 302) shows the lode to have been quite a broad mineralized zone, having tops and apices in all the locations of the Eureka Company. If there was no apex in either the At Last or Lupita, the question of non-parallelism of end-lines could not have been injected into the case, as the end-lines of the Champion were parallel.

The contention of the Richmond Company, eliminating the question of structural geology, over which the battle raged fiercely, and other matters not pertinent to this discussion, was as follows:

(1) That the Richmond held the prior title. The locations of the Richmond and Tip Top, to which the patents related, were made in 1869. Its patents called for a certain number of feet of the lode. It contended that it had a right to follow the vein *on its strike* beyond the end line W–X to the linear extent claimed.

This contention was thus expressed in the bill of exceptions settled and filed in the cause:

> "7th. That the said patents to the defendants (Richmond) offered in evidence do not, as to the special and particular lodes therein named respectively, limit or confine the defendants in the right to follow the vein or lode, with its dips, angles and variations in their depth—to

such portions thereof as lie between vertical planes drawn downward through the end lines of the location of the surface ground so continued in their own direction that such planes will intersect the exterior parts of said veins or ledges, but that such limit or restraint only applies to the veins other than the special lodes named and granted."

Note.—The evidence showed that the "special lode" referred to was the *one* lode located September 20, 1869, *i. e.* under the Act of 1866. The *other* lodes were those supposed to be granted by the Act of 1872.

It is in the light of this contention that the opinion of Judge Field is to be read.

(2) That the end-lines of the At Last and Lupita, belonging to the Eureka, were not parallel, as required by the Act of 1872. Therefore the Eureka could not follow the lode outside of its vertical side boundary. As a corollary to this, the Richmond was entitled to the ore bodies in dispute, because they were underneath the surface of the Utah, Arctic and Atlantic, which belonged to the Richmond Company.

The similarity between the facts in the Eureka case and the one at bar is obvious.

When we compare the chronology of the two cases, we find that Judge Field in his opinion (4 Sawy. 319) says that it did not appear when the Eureka locations were made. He *assumed* they were made under the Act of 1866. There was a deed in evidence executed by the Eureka Company to the Richmond Company, dated April 26, 1871, which recited the ownership by the Eureka Company of the Champion, At Last, and Margaret (Lupita) claims, which made the inference conclusive that they were located prior to that date, *i. e.*, under the Act of 1866.

Speaking of this, this court said in its opinion affirming the judgment:

> "The Eureka Company at some time *before April 26,*
> "*1871,* but at what precise date does not appear, became
> "the owner of the Champion, At Last, and Margaret
> "(Lupita) claims."

Richmond vs. *Eureka*, 103 U. S. 839, 841.

There is no room for ambiguity or inference as to when the Pioneer or Argonaut was acquired. It had passed to entry under the Act of 1866, and this fact appears on the face of the patent.

With reference to the position of the ore bodies in dispute in the Eureka case, the facts were found by the trial court as follows :

> "17th. That the mining ground in dispute is situated
> "within the lode or ledge as hereinbefore described,
> "and within planes drawn vertically down through the
> "end lines of the plaintiff's patented location of the
> "Champion claim, and within planes drawn vertically
> "down through the extreme points of the patented loca-
> "tions of the At Last and the Lupita or Margaret claims
> "at right angles to the course or strike of the said lode
> "or ledge, and produced so as to follow the dip of the
> "lode. The top or apex of said lode is within the sur-
> "face lines of said patents to the plaintiff, and said lode
> "dips at right angles to its course, and on such dip ex-
> "tends under the surface of the Utah and Arctic claims
> "of defendants."

This finding was undoubtedly made in order to apply the reasoning of Judge Field given in his opinion when speaking generally of end-lines under local rules :

> "Lines drawn vertically down through the ledge or
> "lode at right angles with a line representing this gen-
> "eral course at the ends of the claimant's location will
> "carve out, so to speak, a section of the ledge or lode
> "within which he is permitted to work and out of which
> "he cannot pass."

In awarding judgment in favor of the Eureka Company, the trial court said :

> " Inasmuch as the ground in dispute lies within planes " drawn vertically downward through the end-lines of " the plaintiff's (Eureka) patented locations, our conclu- " sion is that the ground is the property of the plaintiff, " and that judgment must be for its possession in its " favor."
>
> *Eureka case*, 4 Sawy., at p. 325.

This judgment was affirmed by the Supreme Court of the United States, from whose opinion we select the following extracts:

> " The particular mining ground in dispute is situated " within the zone of limestone which has been described " and within planes drawn vertically down through the " end-lines of the Champion Company as patented, and " within planes drawn vertically down through the ex- " treme points of the patented locations of the At Last " and Margaret claims at right angles to the course or " strike of the zone and produced so as to follow its dip."
>
> " The top or apex of the zone is within the surface " lines of the patents to the Eureka Company, and the " zone dips at right angles to its course and on such dip " extends under the surface of the Arctic and Utah " claim. * * * The end lines of the surveys of the " At Last and Margaret (Lupita) claims as patented are " not parallel with each other."
>
> *Richmond* vs. *Eureka*, 103 U. S. 839, 844.

> " The finding that the ground in dispute is within the " end-lines and that the apex is within the surface lines " settles the rights of the parties between themselves *as* " *well under their patents* as under their compromise agree- " ment."
>
> *Id.*, p. 847.

This case, and those from which we have heretofore quoted, conclusively establish the proposition announced by both trial and appellate courts in the case at bar, that under the Act of

1866 end-lines were not required to be parallel, and a failure to so parallel them does not prevent the exercise of the extra-lateral right.

The only case where this question was involved which has found its way into the courts since the decision of the Eureka case is *Carson City G. & S. M. Company* vs. *North Star*, tried before Judge James H. Beatty, sitting as Circuit Judge, Ninth Circuit (73 Fed. 597), and reviewed and affirmed by the Circuit Court of Appeals (83 Fed. 658). *Certiorari* was applied for to this Court and denied in May, 1898. We herewith reproduce an illustration of that case for convenient reference (figure 4).

FIGURE 4.

The title to the North Star originated under the Act of 1866. It was a composite of a number of claims. Application for patent was pending at the date of the passage of the Act of 1872. The patent was not issued until long after the Act was passed. The only difference between the North Star case, the Eureka case and the one at bar is found in the fact that in the North Star case the end-lines are converging instead of diverging in the direction of the dip. To defeat the North Star extra-lateral right, non-parallelism of the end-lines was urged by the Carson City (Irish-American) Co., underneath whose surface the vein penetrated. The contention met the same fate as in the Eureka case.

"Under the Act of 1866 end-lines were not required to be parallel."

Carson City vs. *North Star*, 73 Fed., 597, 599;
Id., on appeal, 83 Fed. 658, 669.
Certiorari denied by this court May, 1890.

As heretofore noted the doctrine was also affirmed in
Iron S. M. Co. vs. *Elgin*, 118 U. S. 196, 208;
Walrath vs. *Champion*, 63 Fed. 552:
Con. Wyoming vs. *Champion*, 63 Fed. 540, 550.

Cases Cited by Plaintiff in Error Do Not Overthrow or Modify the Doctrine of the Eureka Case.

The doctrine of the Eureka case, so far as it applies to locations made under the Act of 1866, has never been shaken.

Counsel for plaintiff in error urges that it was practically overruled by *Iron S. M. Co.* vs. *Elgin*, 118 U. S. 196, commonly known as the "Horseshoe case."

Judge Field also wrote the opinion in this case, and it is sufficient to quote the following excerpt from that decision:

"Under the Act of 1866, parallelism in the end-lines "of a surface location was not required; *but where a* "*location has been made since the Act of* 1872, such "parallelism is essential to the existence of any right in "the locator or patentee to follow his vein outside of the "vertical planes drawn through the side lines. His "lateral right by the *statute* is confined to such portion "of the vein as lies between such planes drawn through "the end lines and extended in their own direction; that "is, between parallel vertical planes. It can embrace "no other portion."

There is no question but what the locations involved in the "Horseshoe case" were made under the Act of 1872. It is a matter of current history, that the carbonate deposits of Leadville, where the property in controversy is situated, were not discovered until 1874. In addition to this the original complaint filed in the case (see statement of the case preceding opinion, 118 U. S. 196), disclosed the title under *location*, and necessarily disclosed the date of such location. The patent was issued after the suit was brought, and title thereunder set up by supplemental pleading. Judge Field bases his decision upon the Statute of 1872, applied to *locations* made under it.

Certain other cases cited by appellant's counsel, as either modifying or overruling the doctrine of the Eureka case, deserve passing notice.

Walrath vs. *Champion*, 171 U. S. 293. For purpose of illustration we reproduce in miniature the map (Figure 5) of the properties involved in this case.

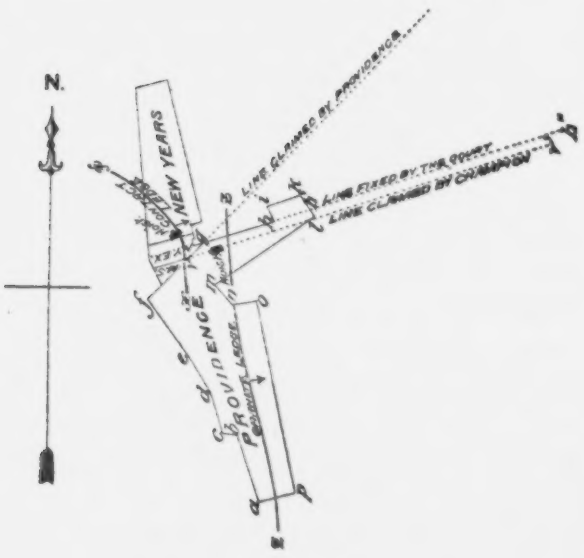


FIGURE 5.

The Providence patent issued under the Act of 1866 was for the irregular shaped surface shown in the figure and granted but the *one lode* Z–Z, as this was all that could be granted under the Act of 1866. Section 3 of the Act of May 10, 1872 (17 Stat. at Large, p. 91), granted to the owner of the patent *all other lodes* which were thereafter discovered within the surface boundaries. Another ledge was thereafter discovered—the contact ledge X–X. The only title to this ledge, acquired by the patentee of the Providence, was the grant contained in the Act of 1872. The only controversy in the case was over the newly discovered X–X ledge. The Providence insisted that its extralaterial rights should be defined by the line f–g, because the new ledge crossed it. This line was not an end-line of the original location. The illustration f–g, from the Champion counsel's brief, displayed on page 72 of the brief of plaintiff in error, was an illustration of the pore-

ative force of the Act of 1872. We contended in the appellate courts in that case that the extralateral rights of the Providence on the newly discovered ledge were limited and defined by the end-lines of the original location—a–p and g–h—according to the mandate of the Statute of 1872, under which, alone, the Providence acquired title to such ledge. This view was upheld.

The Act of 1866 was not involved in that case, only to the extent of determining where, under the patent issued under that act, the end-lines of the location were, and to refer the supplemental rights conferred upon that location by the act of 1872 to those end-lines, as defined in such patent.

We fail to see wherein this militates against or in any way modifies the doctrine of the Eureka case.

Flagstaff vs. *Tarbet*, 98 U. S. 463, was a case where the patent called for 2600 feet of the lode, but instead of locating along the vein it was located *crosswise*, so as to include only 100 feet of the vein within its surface boundaries. The vein crossed the lines established by the locator as *side-lines*, which became in law the *end-lines*. The width allowed to surface location under the local rules was 100 feet. The following diagram (Figure 6) will illustrate the facts of this case:

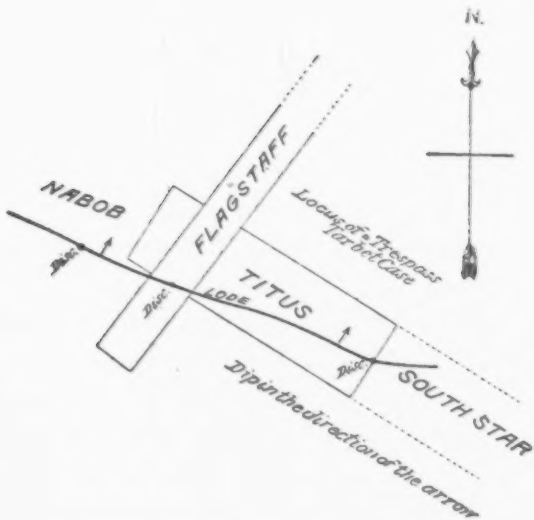


FIGURE 6.

The Flagstaff Company asserted its rights to follow the lode out of and beyond its legal end-lines, just as the Richmond claimed the right to do in the Eureka case. The Flagstaff case simply follows the Eureka case, denying any such right.

The case of *Argentine* vs. *Terrible*, 122 U. S. 478, the facts of which are illustrated by Figure 7, is a duplicate of the

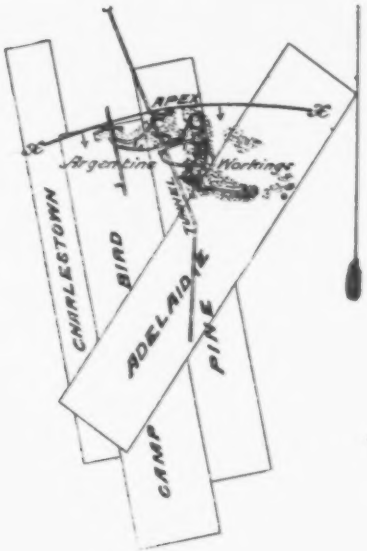


FIGURE 7.

Flagstaff case, only that it arose out of locations made under the Act of 1872. The owner of the Pine crossed over with its workings into the Adelaide, asserting its right to follow the vein on the *strike* out of its boundaries. It was another attempt to reach out beyond vertical planes drawn through the legal end-lines, and, as in the Eureka case, it failed.

We fail to observe any modification of the doctrine announced in the Eureka case, that "under the Act of 1866 end-lines were not required to be parallel." This language, so often repeated by the courts in comparing the Act of 1866 with the Act of 1872, is certainly not meaningless. If it means anything, it means that the extralateral right is not to be denied to locators under the first Act, if the end-lines of the location are not parallel.

We shall have occasion to again refer to the Eureka case when dealing with the "right angle" theory exhibited in the illustration accompanying the decision in *Kinney* vs. *Cons. Virginia M. Co.*, 4 Sawy. 382, reproduced on page 59 of the brief of plaintiff in error, and commented on by counsel for plaintiff in error at page 57 of their brief.

II.

Although the end lines were not required to be parallel under the Act of 1866, yet, if by any process of reasoning any limitation upon the extralateral right was imposed upon the locator's title (e. g., "right angle" limitation) by reason of the divergence of the end-lines, the limitation was removed by the Act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end-line planes of such location, as it then existed.

We quote so much of Section 3 of the Act of May 10, 1872 as will serve to illustrate this proposition:

> "The locators of all mining locations *heretofore* made
> " * * * on any mineral vein, lode or ledge on the
> " public domain, their heirs or assigns, where no adverse
> " claim exists at the passage of this Act, so long as they
> " comply with the laws of the United States, and with
> " state, territorial and local regulations not in conflict
> " with the laws of the United States governing their
> " possessory title, shall have the exclusive right of pos-
> " session and enjoyment of all the surface included within
> " the lines of their locations, and of all veins, lodes and
> " ledges throughout their entire depth, the top or apex
> " of which lies inside of such surface lines extended
> " downward vertically, although such veins, lodes or
> " ledges may so far depart from a perpendicular in their
> " course downward as to extend outside the vertical lines

" of such surface locations. But their right of possession
" to such outside parts of such veins or ledges shall be
" confined to such portions thereof as lie between vertical
" planes drawn downward, as above described, through
" *the end-lines of their locations*, so continued in their own
" direction that such planes will intersect such exterior
" parts of such veins or ledges. And nothing in this
" section shall authorize the locator or possessor of a vein
" or lode which extends in its downward course beyond
" the vertical lines of his claim to enter upon the surface
" of a claim owned or possessed by another."

The Pioneer claim had been located, surveyed for patent, and final entry had been made when this provision of the law was passed. The end-lines of a location are those crossed by the lode.

Flagstaff M. Co. vs. *Tarbett*, 98 U. S. 463, 467;
Argentine M. Co. vs. *Terrible M. Co.*, 122 U. S. 478, 485;
King vs. *Amy & Silversmith M. Co.*, 152 U. S. 222, 228;
Del Monte Mining & Milling Co. vs. *Last Chance*, 171 U. S. 55, 64;
Eilers vs. *Boatman*, 3 Utah, 159, 167;
Stevens vs. *Williams*, 1 Mor. Min. Rep. 557, 562;
Tombstone M. & M. Co. vs. *Wayup M. Co.*, 25 Pac. 794, 796;
Watervale M. Co. vs. *Leach*, 33 Pac. 418, 421;
Colorado Central vs. *Turck*, 50 Fed. 888, 896 (S. C. on rehearing, 54 Fed. 262, 267);
Tyler Min. Co. vs. *Sweeney*, 54 Feb. 284, 294;
New Dunderberg vs. *Old*, 79 Fed. 588, 606.

The lines of the Pioneer, which are crossed by the lode are, on the north, the common boundary between the Kennedy and Pioneer, viz: the line A—*B* on Exhibit A and the one at the south end. It is agreed that the lode crosses both of these lines.

Par. XXI, Agreed Statement, Trans., fols. 171-2.

This Act of 1872 was framed on entirely new theories. As was said by the present Chief Justice of the Supreme Court of California, when occupying a seat on the Supreme bench of Nevada:—

> "Disagreeable as the awakening may be, it is time we "are opening our eyes to the fact that a new system has "been introduced."
>
> *Gleason* vs. *Martin White M. Co.*, 13 **Nev. 442, 459.**

It is unnecessary to comment on all the changes introduced by the new system. It will suffice to invite attention to those which bear directly on the questions under discussion.

The old law was framed upon the theory that the vein was the principal thing, and the surface a mere incident. Under this law as stated by Judge Brewer in the Del Monte case *supra*, patents were issued to claims with irregular-shaped surfaces the lines of which, as stated by Judge Field in the Eureka case, did not define the underground rights in the vein.

The new law gave controlling effect to surface boundaries.

The old law granted but one lode; the new, all lodes whose tops or apices might be found within the surface boundaries.

Under the old law end-lines were not required to be parallel. As under the old system, inequalities between length at the surface and in depth, were possible, parallelism was made essential to the exercise of the extralateral right.

As under the old law rights had accrued and become vested, these rights were recognized and confirmed. In order to reduce the possibilities of conflict between those claiming under the old and those who might acquire rights under the new to a minimum, the Act of 1872 granted to the owners of locations held under the old law, instead of the one lode, all lodes found within their surface lines, where adverse rights had not

arisen prior to the passage of the Act. And to avoid the possibility of difficulty as to underground segments of veins, the Government granted or confirmed to the holder of locations, as they then existed, *in the absence of adverse claims*, all of the veins in depth which might be found between the end-lines of their locations. No one disputes the right of the Government to do this. The language of the grant, in this behalf at least, is not confined to locations theretofore made whose end-lines were parallel.

The provision of the Act that end-lines should be parallel, which is found in another section (Section 2, Rev. Stats. 2320) is prospective in its operation and applies to locations which are required to be made *in the form prescribed by that section.*

The end-lines of locations theretofore made were the lines which were crossed by the lode, as these lines existed at the date of the passage of the Act.

Said Judge Hawley in the case of *Walrath* vs. *Champion M. Co.*:

> "The Act of 1872, in granting all other veins that
> " were within the surface lines of previous locations,
> " did not create any new lines for such other veins,
> " nor invest the Court with any authority to make new
> " end-lines for such other veins. And it is apparent
> " from an examination of the statute that the Court has
> " no power to make a new location for every vein that
> " may be found within the surface lines of the location,
> " and thereby enlarge the rights of the original locators.
> " When the end-lines are once fixed they bound the ex-
> " tralateral rights to all the lodes that are thereafter found
> " within the surface-lines of the location. *It necessarily*
> " *follows that the end-lines* of the Providence Survey
> " (made under the Act of 1866) must be considered as
> " the end-lines of any and all other lodes or veins which
> " lie 'inside of such surface lines.' Otherwise endless
> " confusion would arise in the construction of the statute."
>
> 63 Fed. 557.

And Justice McKenna, speaking for this Court in the same case, says:

> "Appellant's right on the contact vein is given by this "statute. What limits this right extralaterally? The "statute says, *vertical planes drawn downward through the "end-lines of the location.* What end-lines? Those of "and as determined by the *original location and lode*, the "Circuit Court of Appeals decided. Those determined "by the direction of the newly discovered lodes, regard-"less whether they were originally intended as end-lines "or side-lines, the appellant, as we have seen, contends. "The Court of Appeals was right. Against the conten-"tion of the appellant the letter and spirit of the statute "oppose, and against it the decisions of this Court also "oppose."
>
> *Walrath* vs. *Champion Min. Co.*, 171 U. S. 293, 306.

When the Act of 1872 was passed, the Pioneer claim had passed to entry. Its survey had fixed the lines as shown in the plat, Exhibit A. The faith of the Government was pledged to the issuance of its patent according to that survey. Is there any room for doubt as to what "end-lines" of the Pioneer the Act of 1872 referred to? There is no ambiguity in the language. We know of no canon of statutory interpretation that will enable appellant to distort its meaning into a requirement that we should retrace our steps, resurvey our claim, and readjust our lines before we could obtain a grant of the extralateral right. Appellant claims no rights which were adverse to the Pioneer Company at the date of the passage of the Act of 1872. The Kennedy Company's claims, under the Silva surface title overlying the dip, originated in 1892, twenty years after the passage of that Act. How can it be heard to complain?

III.

The title evidenced by the certificate of purchase issued prior to the passage of the Act of 1872, was the complete equitable title equivalent for all practical purposes to the issuance of a patent. Congress could not deprive the purchaser of any rights acquired under that certificate, nor cast upon such purchaser any additional burden. It is quite manifest, however, that Congress never intended that the estate of any mining locator held prior to May 10, 1872, should suffer any diminution or curtailment by reason of the Act passed on that day.

The first proposition involved in the foregoing statement is almost elementary.

Plaintiff in error asserts that although the Pioneer claim as located and surveyed under the Act of 1866 had been purchased and entered for patent prior to the passage of the Act of 1872, yet nevertheless, the Act of 1872 required its owners to go into the field and reform the surface lines under penalty of the entire loss of the extralateral right which they confessedly owned prior to the passage of the Act of 1872. In other words the Act of 1872 required the Pioneer owners to go into the field, resurvey the claim, readvertise, and in fact commence proceedings *de novo* in the land office, under the penalty of losing the rights which the Government had guaranteed by the issuance of its certificate of purchase.

In the first place, if Congress had the power to impose any such additional burdens upon the complete, equitable title, it would have manifested its intention to do so unequivocally.

In the next place, the Act of 1872 specially preserved all pre-existing rights, thus manifesting the intention of Congress not to impose any additional burdens on prior claimants.

A similar question was before the Supreme Court of California in a recent case, wherein that Court, speaking as in the case at bar through Justice Temple, announced the view that where a mining claim had passed to entry prior to the passage of the Act of 1872, to insist that owners of such claims were compelled to submit to the insertion in their patents of reservations not required *or* authorized by the Act under which the certificate was issued, would violate the provisions of section 16 of the Act of 1872, "that nothing contained in this Act should be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

Crane's Gulch Min. Co. vs. *Scherrer*, 66 Pac., 487.

The language of the Circuit Court of Appeals, 8th Circuit, in a case involving an entry and patent in all respects similar to the Pioneer patent, is quite pertinent. After referring to the acts to be performed by an applicant for a patent under the Act of 1866, the Court says:—

> "The claimant of the Frostberg lode had done all "this before the Act of 1872 was passed. He had des- "ignated the boundaries of the claim. It had been sur- "veyed and marked on the ground. His notice of "intention to apply for a patent had been given. No "adverse claim had been filed in the land office, and "on February 27, 1872, he had entered it for patent. . .
>
> "When the Act of 1872 was passed he was already "entitled to the Frostberg lode and to the surface de- "scribed in his claim under the Act of 1866. . . .
>
> "The patent which the department issued in 1876 "was a judgment of that tribunal that no such (adverse) "claim did exist on May 10, 1872, and that no adverse "rights would be affected by issuing it in accordance "with the provisions of the Act of that date.
>
> "It is at the same time a judicial determination of "these questions and a conveyance of the legal title to "every lode or vein whose apex lay within surface "boundaries of the patented claim extended downward "vertically."

New Dunderberg Min. Co. vs. *Old*, 79 Fed. 603.

Judge Nicol, who tried the case at bar, presented his views on this subject quite fully. These views and the authorities cited by him will be found in his opinion printed in full as an appendix to this brief.

We shall limit ourselves to quotations from a few of the leading cases discussed in that opinion.

> " By the mining laws of the United States three dis-
> " tinct classes of title are created, viz: 1—Title in fee
> " simple; 2—Title by possession; 3—The complete
> " equitable title. The first vests in the grantee of the
> " Government an indefeasible title, while the second
> " vests a title in the nature of an easement only. The
> " first being an absolute grant by purchase and patent
> " without condition, is not defeasible, while the second,
> " being a mere right of possession and enjoyment of
> " profits without purchase and upon condition, may be
> " defeated at any time by the failure of the party in
> " possession to comply with the condition, viz: To per-
> " form the labor or make the annual improvements
> " required by the statute. The equitable title accrues
> " immediately upon purchase, for the entry entitles the
> " purchaser to a patent, and the right to a patent once
> " vested is equivalent to a patent issued."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 428.

> " When the price is paid the right to a patent immedi-
> " ately arises. If not issued at once, it is because the
> " magnitude of the business in the Land Department
> " causes delay. But such delay, in the mere adminis-
> " tration of affairs, does not diminish the rights flowing
> " from the purchase, or cast any additional burdens on
> " the purchaser, or expose him to the assaults of third
> " persons."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 431, 432.

> " The right to a patent once vested is treated by the
> " Government, when dealing with the public lands, as
> " equivalent to a patent issued. When, in fact, the patent
> " does issue it relates back to the inception of the right
> " of the patentee, so far as may be necessary to cut off
> " intervening claimants."

Stark vs. *Starr*, 6 Wall. 402.

"Lands which have been sold by the United States "can in no sense be called the property of the United "States. They are no more the property of the United "States than lands patented. So far as the rights of "the purchaser are considered, they are protected under "the patent certificate as fully as under the patent. "* * * When sold, the Government, until thepatent "shall issue, holds the mere legal title for the land in "trust for the purchaser."

Carroll vs. *Safford*, 3 How. 441.

"A receipt and certificate of purchase from the "United States land office is the equivalent of a patent."

Con. Wyoming G. M. Co. vs. *Champion M. Co.*, 63 Fed. 540;

Walrath vs. *Champion*, 63 Fed. 552.

"By the payment and acceptance of the purchase "money the claimant has performed everything to be "done by him, and the purchase has been completed. "The payment, receipt of the purchase money, and the "issuing of a receipt and certificate of entry therefor, "constitute an entry of the land. The contract of pur- "chase is executed and the land is his, and no longer "belongs to the Government. The conveyance has not "been made, but the Government of the United States "only holds the legal title in trust for the purchaser. "The land no longer constitutes a part of the public "domain. The United States have ceased to have any "proprietary interest in it. It is henceforth private prop- "erty. * *"

Peo vs. *Shearer*, 30 Cal. 645, 648, cited in

Lux vs. *Haggin*, 69 Cal. 429;

See also *Crane's Gulch Min. Co.* vs. *Scherrer* (Cal.) 66 Pac. 487.

"The United States has ceased to have any pecu- "niary interest in it. They hold the naked, dry, legal "title for the holder of the certificate."

Hamilton vs. *Southern Nev. Min. Co.*, 13 Sawy. 113; 33 Fed. 562.

Union M. Co. vs. *Danberg*, 2 Sawy. 455.

Amador Medean Gold M. Co. vs. *South Spring Gold Min. Co.*, 13 Sawy. 523; 63 Fed. 668, 670.

Aurora Hill Cons. Min. Co. vs. *85 Min. Co.*, 12 Sawyer, 355; 34 Fed. 515.

"The rule is well settled by a long course of decisions, "that when public lands have been surveyed and placed "in the market, or otherwise opened to private acquisi- "tion, a person who complies with all the requisites "necessary to entitle him to a patent in a particular lot "or tract is to be regarded as the equitable owner thereof. "* * * The public faith has been pledged to him. * * *"

Wirth vs. *Branson*, 98 U. S. 118.

"There is no conflict in the rulings of this Court upon "the question. With one voice they affirm that when "the right to a patent exists, the full equitable title has "passed to the purchaser, with all the benefits, im- "munities and burdens of ownership, and no third party "can acquire from the Government interests as against "him."

Benson Min. Co. vs. *Alta Min. Co.*, 145 U. S. 428, 434.

A patent when issued relates back to the first initial valid step which is the foundation of the right and in pursuance of which the patent is issued.

Kahn vs. *The Old Telegraph Min. Co.*, 2 Utah, 174, 188; 11 Mor. Min. Rep. 645, 652;

Benson Min. Co. vs. *Alta Min. Co.*, 145 U. S. 428, 434;

Stark vs. *Starr*, 6 Wall. 402, 418;

Ely vs. *Frisbie*, 17 Cal. 250, 260;

Yount vs. *Howell*, 14 Cal. 465, 470;

Touchard vs. *Crow*, 20 Cal. 150, 161;

Aurora Hill Co. vs. *85 Min. Co.*, 12 Sawy. 355, 360; 34 Fed. 515, 518;

Eureka Min. Co. vs. *Richmond Min. Co.*, 4 Sawy. 302, 317.

In striving to maintain the assertion that the Act of 1872 was retroactive, and placed upon the Pioneer Company, after it had received its certificate of purchase, the duty of reforming its lines, counsel for plaintiff in error urge that the Act of 1866 of itself contained a reservation to Congress of the power to take away something which might be acquired by complying with its provisions.

Counsel says in this behalf (p. 42 of their brief):

> "Recognizing the imminence of the danger that "might lurk in the hastily constructed Act of 1866 and "the necessity for flexibility in the scheme, the Congress "reserved in Sections 1 and 5 the power to make such "changes, laws, regulations and amendments as to supply "the additional means necessary to the complete de- "velopment of the mineral resources of the country, and "made all titles acquired under the act and patents "issued *express this reservation.*"

This is somewhat ambiguous, but so far as it presumes a reserved right in Congress to change its policy with reference to mineral lands and modify or repeal existing laws, so as to correct possible evils, there is no serious objection to it. Congress would have that right without specially reserving it. But what reservations does counsel refer to? They rely upon Sections 1 and 5 of the Act as constituting these so-called *reservations.*

We quote from these sections:

> "SECTION 1. * * * That the mineral lands of "the public domain, both surveyed and unsurveyed, are "hereby declared to be free and open to exploration and "occupation by all citizens of the United States and "those who have declared their intention to become citi- "zens, subject to such regulations as may be prescribed "by law, and subject also to the local customs or rules of "miners in the several mining districts so far as the "same may not be in conflict with the laws of the United "States."

"SEC. 5. * * * That as a further condition of "sale, in the absence of necessary legislation by Con- "gress *the local legislature of any state or territory may* "*provide rules for working mines, involving easements,* "*drainage, or other necessary means to their complete de-* "*velopment;* and these conditions shall be fully expressed "in the patent."

We candidly confess our inability to appreciate the logical connection between counsel's statement and these provisions of the statute.

These so-called reservations or conditions certainly cannot be construed as sanctioning the doctrine that Congress or the states or local district organizations could destroy, curtail or abridge a right given by United States patent, and a certificate of purchase is to all intents and purposes the equivalent of a patent. There is a marked absence of coherence between counsel's statement as to the effect of the Act and the language of the Act itself.

The supervisory power of the Land Department after the issuance of a certificate of purchase to recall the certificate for the purpose of correcting errors or omissions, and making it conform to the law *under which it is issued*, or to prevent the perpetration of a fraud, is altogether a different thing from recalling it and inserting in the patent conditions and reservations which were not authorized by that Act.

But Congress never intended by the Act of 1872 to interfere with existing rights. The Act itself specially preserved them.

We quote the following from the Act:—

Section 9 provided as follows:—

"That sections one, two, three, four and six of an "Act granting the right of way to ditch and canal own- "ers over the public lands and for other purposes, ap- "proved July 26, 1866, are hereby repealed, *but such* "*repeal shall not affect existing rights.* Applications for

" patents for mining claims now pending may be prose-
" cuted to a final decision in the General Land Office;
" but in such cases, where adverse rights are not affected
" thereby, patents may issue in pursuance of the provis-
" ions of this Act; and all patents for mining claims
" heretofore issued under the Act of July 26, 1866,
" shall convey all the rights and privileges conferred by
" this Act, where no adverse rights exist at the time of
" the passage of this Act."

(Section 2328 *Revised Statutes.*)

In section 12 we find the following:—

" Nothing in this Act shall be construed to enlarge
" or affect the rights of either party in regard to any
" property in controversy at the time of the passage of
" this Act, or of the Act entitled 'An Act granting the
" right of way to ditch and canal owners over the public
" lands, and for other purposes,' approved July 26, 1866,
" *nor shall this Act affect any right acquired under said Act*";

And Section 16 provides,

" That all Acts and parts of Acts inconsistent here-
" with are hereby repealed; *provided that nothing con-*
" *tained in this Act shall be construed to impair in any*
" *way, rights or interests in mining property acquired*
" *under existing laws.*"

This manifests the unequivocal intention of Congress to preserve all rights previously acquired and the Act must be so construed.

Eclipse G. & S. M. Co. vs. *Spring*, 59 Cal. 304.

Crane's Gulch M. Co. vs. *Scherrer*, 66 Pac. 487.

As was said by Judge Field in the Eureka case (4 Sawy. 323):—

" The Act of 1872 preserves to the miner the rights
" acquired under the Act of 1866 and confers upon him
"additional rights."

IV.

The patent of the United States issued to the predecessor in title of the Argonaut Company in terms grants the vein throughout its entire depth between the end-lines described in the patent and shown on the plat (Exhibit A) and these lines extended in their own direction. The Land Department had jurisdiction of the subject-matter. The patent is not open to collateral attack.

We do not understand that the general doctrines as to the conclusiveness of patents is assailed by plaintiff in error. We readily concede that the validity of a patent may be attacked by showing want of jurisdiction in the Land Department to issue it, or that such patent grants something which that department had no power to convey.

The contention of plaintiff in error seems to be about as follows:

The patent was issued after the passage of the Act of 1872. After that date at least the Land Department had no power to grant extralateral rights to a claim having non-parallel end-lines.

In answer to this we have simply to reiterate what we have heretofore said that the right to the patent in this case became vested under a law which did not require end-lines to be parallel. The patent when issued confirmed these rights as well as the additional ones vouchsafed by the Act of 1872.

Or otherwise stated, the act of 1872 conferred upon locators of claims theretofore owned the right to pursue the vein in depth between vertical planes drawn through the end-lines of the location as such location then existed, regardless of the parallelism or non-parallelism of such end-lines. The patent simply followed the statute.

There is another suggestion which we consider of sufficient importance to be noted at this juncture.

There can be no question but that the Land Department had jurisdiction to pass upon the Pioneer application for patent. In the process of adjudicating the rights of the Pioneer, after the period of publication had passed, it devolved upon that Department to determine in addition to the extent of rights claimed in the vein, the quantity and form of the surface to which the applicant was entitled, or as was said by this Court, speaking through Justice Brewer in the Del Monte case:

> " Obviously the statute contemplated the patenting of
> " a certain number of feet of the particular vein claimed
> " by the locator, no matter how irregular its course, made
> " no provision as to the *surface area or the form* of
> " the surface location, *leaving the Land Department*
> " *in each particular case* to grant so much of the
> " surface as was fixed by local rules, or was in the ab-
> " sence of such rules in its judgment necessary for the
> " convenient working of the mine."
>
> *Del Monte Case*, 171 U. S., 55, 64.

It will be presumed in favor of the validity of the Pioneer patent issued upon a certificate of purchase antedating the passage of the Act of 1872, either that the local rules existing and in force in the district when the certificate of purchase was issued, permitted the Pioneer owners to take their surface in its present patented form, or that such extent and form of surface was, in the judgment of the Department, " necessary for the convenient working of the mine."

In proceedings to obtain patents it devolves upon the Land Department, in the absence of adverse claims and suits brought to determine them, to decide what rules and regulations are in force in a given district, and its decision upon the subject is final.

Parley's Park M. Co. v. *Kerr*, 130 U. S. 256, 262.

The position of counsel is practically a collateral attack on the patent.

How could we reform these surface lines so as to parallel the end-lines without cutting off some of the *surface* to which we had acquired the complete equitable title, equivalent, as against third persons at least, to a patent?

Does not the construction of the Act of 1872 contended for by counsel for plaintiff in error, entirely nullify the express declaration, thrice repeated in the law itself, that rights acquired under laws theretofore existing should not be impaired?

In the trial and appellate courts, the case of *Lakin* vs. *Dolly*, 53 Fed. 332, and *Lakin* vs. *Roberts*, 54 Fed. 461, were frequently quoted by counsel for plaintiff in error as supporting the conclusion that the Act of 1872 was a curtailment of rights acquired by locations made under the Act of 1866, and that as the Pioneer patent was issued after the passage of the Act of 1872, we could acquire no greater rights than were conferred upon locations made under that Act.

We do not find these cases referred to in their brief filed in this court. We are not in a position to determine how far this Court in its search for further light may deem it necessary or expedient to exploit the somewhat voluminous "Appendix." Therefore as a precautionary measure we deem it advisable to present our views of these cases.

We present a diagram (Figure 8) showing the Mammoth claim, the property involved in the Lakin cases, the shaded lines representing the ground as to which the Court held the patent was valid.

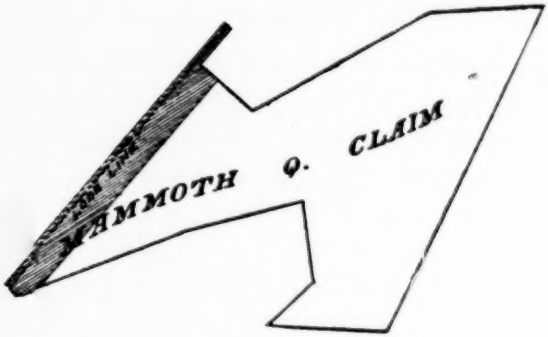


FIGURE 8.

The unshaded portion embraced the town of Johnsville, covering 252.95 acres of land connected with a location of one lode.

The application for patent was made in 1867, but no entry or payment was made until 1877.

It appeared at the trial of the case, upon an *agreed statement of facts*, that when the Mammoth claim was located there was no local rule, usage or custom authorizing surface to be appropriated in excess of 100 feet on each side of the vein, and that the unshaded area shown on the diagram *never was covered by the Mammoth location.* This was an admission which practically went to the jurisdiction of the Land Department, to grant a patent for an area in excess of the amount allowed by local rules.

At all events the case has since been twice explained by the same appellate court which handed down the opinion. The first explanation will be found in *Carson City* vs. *North Star*, 83 Fed. 658, the opinion being written by Judge Hawley, who originally decided the Lakin-Dolly case (53 Fed. 333).

In the very recent case of *Peabody Gold Mining Company* vs. *Gold Hill M. Co.*, 111 Fed. 817, the same court thus disposes of the Lakin-Dolly case:

> "The admitted facts effectually rebutted the presumption which otherwise would have attended the patent, the presumption that the locator was lawfully entitled to all the premises described in his grant, and that all the previous requisites of the law had been complied with."

In the North Star case, as in the case at bar, the Lakin-Dolly case was urged for the purpose of defeating the North Star extralateral right, without success, however.

Counsel for plaintiff in error insisted in the courts below that the Lakin-Dolly cases were practically affirmed by this Court, because it refused to issue a writ of *certiorari*. If this be true, in the light of the facts of that case as heretofore stated, what advantage is said affirmance to the plaintiff in error?

Certiorari was also denied by this Court in the North Star case, which first explained the Lakin-Dolly case, and if the denial of such a writ by this Court is tatamount to an affirmance of the decision of the court below, we are authorized to say that this Court has approved of the explanation of the Lakin-Dolly case given by the Circuit Court of Appeals in the North Star case.

In the case of *St. Louis Smelting Co.* vs. *Kemp*, 104 U. S. 636, an attack was made upon a mining patent, on the ground that the Land Department had no jurisdiction to grant under the placer laws a surface area greater than 160 acres. And as the patent in that case purported to convey more than that, it was contended that it was void. As to this contention, the Court said (p. 646):

"A patent in a court of law is conclusive as to all mat-
"ters properly determinable by the Land Department
"when its action is within the scope of its authority; that
"is, when it has jurisdiction under the law to convey the
"land. In that court the patent is unassailable for mere
"errors of judgment. Indeed, the doctrine as to the reg-
"ularity and validity of its acts where it has jurisdiction
"goes so far that if in any circumstances under existing
"laws a patent would be held valid, it will be presumed
"that such circumstances existed."

See, also,

Tucker vs. *Masser*, 113 U. S. 203.

The Pioneer having been located under the Act of 1866, which fixed a limitation of 200 feet to each locator, was presumptively a consolidation of a number of claims on the supposed course of the vein.

St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636;

North Star case, 73 Fed. 597; 83 Fed. 658.

When these were all united in one ownership it is very easy to conceive how non-parallelism in the two extreme end-lines might result. The Carson City-North Star case is a striking illustration of this. In Figure 9 we reproduce the

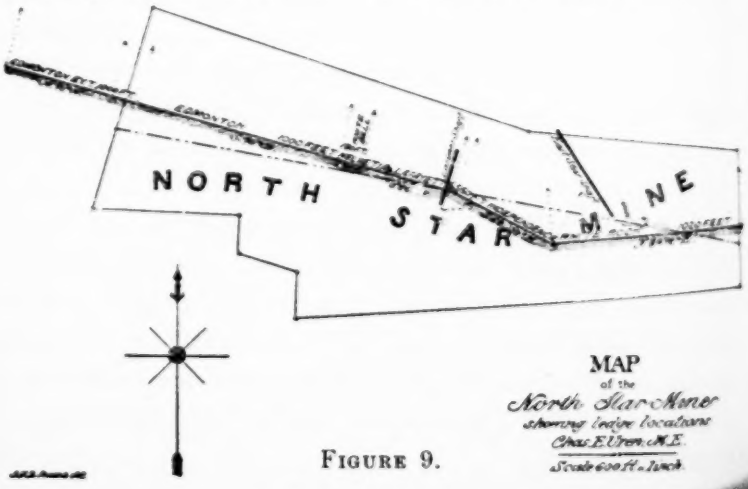


FIGURE 9.

North Star surface, delineating within it the different aggregation of claims of which it was composed. A casual inspection of this composite shows that the extreme end-lines are practically at right angles to the *local* strike across which they are drawn, but are not parallel to each other. Necessarily inequalities in depth existed between the Helvetia and Lafayette, Independence and White Rock, owing to a change in the course of the vein. If the dip of the vein were in the opposite direction we would have an illustration of how the situation might have been as to original locations of which the Pioneer was composed.

It is a matter of common knowledge that the line of outcrop of metalliferous veins is rarely ever coincident with the true strike. It is only so when the vein exposure is on a level surface. In mountainous regions this rarely ever occurs. The slopes of hills, erosions in canyons and other natural occurrences cause deflections in the line of croppings—the miner's guide in locating. The line is curvilinear or angular more often than straight.

Each successive locator of, say 200-foot locations under the Act of 1866 might draw his end-lines approximately at right angles to the strike, as shown within his location, making them substantially parallel, but when a number of claims on the same vein were consolidated it would invariably result in non-parallelism of the extreme end-lines of the composite, as it happened in the North Star case. Should the extralateral right be denied because of this?

With reference to the illustration of the end-lines on the Comstock reproduced from *Kinney* vs. *Con. Va.* (p 59 of brief of plaintiff in error), Mr. Harry I. Thornton, counsel for the Eureka Company, in his argument before this Court in the Eureka case, tells us how it was done, and also how it happened that in some instances end-lines were not parallel.

"It is a part of the history of the country," said Mr. "Thornton, "*that after expensive litigation*, the titles "upon the Comstock all of which antedate 1872 were "generally settled by each claim owner having so many "linear feet of the lode for its entire width with parallel "end-lines across and at right angles to its course, the "exceptions being as to end-lines and not as to width, in "a few special cases of purchase *or where the first locator* "*established for himself end-lines not at right angles to* "*the lode*, or permitted by acquiescence and consent or "otherwise some subsequent adjacent locator to establish "a boundary line not at right angles to the course."

So we see that this symmetrical illustration of plaintiff in error was crystallized in the crucible of litigation—and was not the result of the miners' impulse, nor pursuant to the mandate of local rules. These statements made contemporaneously with the Eureka case suggest several conditions which might be presumed to exist in favor of the validity of the Pioneer patent if any such presumption were at all necessary.

Another condition suggests itself on inspecting the plat Exhibit A.

The south end-line of the Pioneer seems to be coincident with a township line. Possibly this line was a boundary of a prior agricultural patent. Perhaps the Pioneer with its composite of locations originally claimed much more, extending over the township line, but found when it came to survey for patent that it could not obtain all that it claimed. So it applied for and received a patent with a south end-line, coincident with the township line. How plaintiff in error whose right under the Silva accrued twenty years later can legally complain of this is beyond our comprehension.

We respectfully submit that appellant is in no position to assail the patent issued to the Pioneer Company. It is impervious to such collateral attack.

V.

The Courts cannot construct end-lines. The end-lines described in a patent issued by the executive cannot be readjusted by the judiciary. The extra-lateral rights of the Pioneer must be determined by the calls of the patent in connection with the law under which the right to it became perfected and the physical facts as to the course of the vein through the ground.

Upon this subject we have only to quote from the decisions of the Supreme Court of the United States:

> "The Court cannot become a locater for the mining "claimant and do for him what he alone should do for "himself. The most that the Court can do, when the "lines are drawn inaccurately and irregularly, is to give "to the miner such rights as his imperfect location war-"rants under the statute. It cannot relocate his claim "and make new side-lines or end-lines. * * * He "must stand upon his own location, and can take only "what it will give him under the law."
> *King* vs. *Amy*, 152 U. S. 222.

A patent, of course, is but the evidence of a perfected location. It is conclusive evidence as to the limits of the location and cannot be assailed by showing that its actual boundaries were different from those described in the patent.

Waterloo M. Co. vs. *Doe*, 56 Fed. 685, 687;
S. C., 82 Fed. 45.

The question as to what were the true boundaries of the location was a question of fact to be determined by the Land Department. The patent is the judgment of that department.

Golden Reward M. Co. vs. *Buxton*, 79 Fed. 868, 874.

Citing,

Waterloo vs. *Doe*, 54 Fed. 940;
Carson City G. & S. M. Co. vs. *North Star M. Co.* 73 Fed. 597.

VI.

If the Court has any liberty of action in the readjustment of end-line planes the only method for which any judicial precedent can be found is suggested in the Eureka case, i. e., lines drawn at right angles to the course of the vein at the extreme points on the vein within the location. The application of this theory will give all the ore bodies in dispute (and more) to the Argonaut Company.

Finding 17 in the Eureka case was as follows:

> "17th. That the mining ground in dispute is situated "within the lode or ledge as hereinbefore described, and "within planes drawn vertically down through the end- "lines of the plaintiff's patented location of the Cham- "pion claim, and within planes drawn vertically down "through the extreme points of the patented locations "of the At Last and the Lupita or Margaret claims at "right angles to the course or strike of the said lode or "ledge and produced so as to follow the dip of the lode. "The top or apex of said lode is within the surface-lines "of said patents to the plaintiff, and said lode dips at "right angles to its course, and on such dip extends un- "der the surface of the Utah and Arctic claims of de- "fendants."

Evidently the right-angle theory was the subject of discussion in the case. We find Judge Field referring to it in his opinion (4 Sawy., at page 323). Speaking generally of end-lines under local rules, he said:

> "Lines drawn vertically down through the ledge or "lode at right angles with a line representing this gen- "eral course at the ends of the claimant's location will "carve out, so to speak, a section of the ledge or lode "within which he is permitted to work and out of which "he cannot pass."

And in the decision of this Court we find the following statement:

"The particular mining ground in dispute is situated "within the zone of limestone which has been described "and within planes drawn vertically down through the "end-lines of the Champion Company as patented, and "within planes drawn vertically down through the "extreme points of the patented locations of the At Last "and Margaret claims at right angles to the course or "strike of the zone and produced so as to follow its dip."

Richmond vs. *Eureka*, 103 U. S. 839.

We have heretofore shown the difficulty of applying a rectangular theory to any veins except those whose courses were perfectly straight, and have demonstrated how inequalities may arise in cases of composite claims even by following the rectangular theory.

Be that as it may, if we may accept Judge Field's expression as sanctioning a precedent which the courts are at liberty to follow, the application of such a theory to the case at bar will give to defendant in error the ore bodies in dispute, and more. An inspection of figure 10 will demonstrate this.

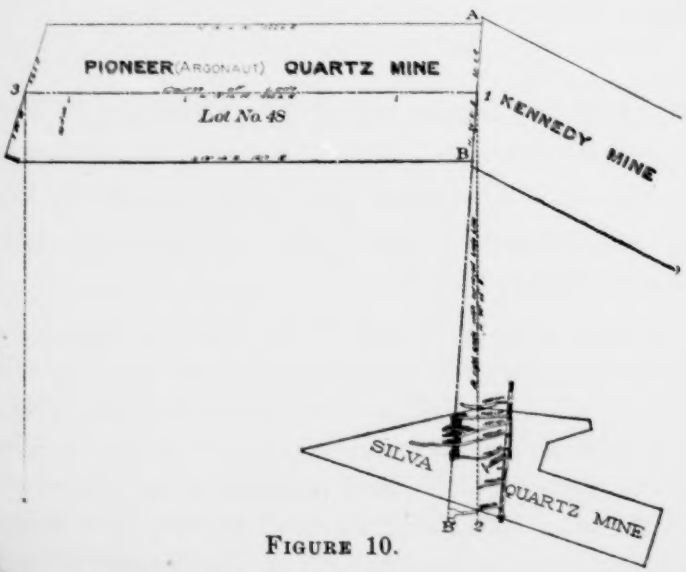


FIGURE 10.

The general course of the vein through the Pioneer ground as fixed by the agreed statement (Par. XXI, Rec. p 29) is N. 19° 14′ W., or N. 19° 14 E′. A course at right angles to this would be N. 70° 45′ E., or S. 70° 45′ W.

Producing these lines on Figure 10 from the extreme points on the vein within the Pioneer location gives us the lines 1—2 and 3—4, as extralateral bounding planes, awarding to the Argonaut a larger segment of the ground invaded by the Kennedy workings than is claimed in this action.

Whatever may be said of the legal value of this method of adjusting inequalities, the original owners of the two properties evidently thought it quite equitable. Their agreement provided for this method of adjusting the conflict between them (Par. VIII, Agreed Statement, Rec. p. 15), but the surveyor, who was the agent of both parties, gave the Kennedy Co. a little the best of it. The Supreme Court of California adopted the rectangular theory here discussed, as will appear from its opinion.

VII.

The Kennedy Mining and Milling Company by reason of its acts and conduct and that of its predecessors in title are estopped from asserting that the Argonaut Mining Company has no extralateral right in the vein in dispute.

It seems to us, in the light of the narrative recited in the agreed statement of facts, that the Kennedy Company should be foreclosed and estopped from asserting any right to the ore body in dispute. There was a common end-line established by the patent surveys. Each patent described this line crossing the lode. No attempt was made for 20 years to deny extralateral rights to the Pioneer. As the Kennedy Company

in its lower workings developed the trend of the ore bodies, finding that they passed out of and beyond the common end-line plane, it made a location necessarily based upon another vein, the surface of such location overlying the dip of the Pioneer vein, and it now insists that by reason of the irregularity of surface form of the Pioneer claim these ore bodies belong by presumption to the Kennedy Company under its Silva location.

Whether or not we may consider the agreement referred to and filed in the patent proceeding as valid and binding on the successors in interest of the two original companies who were parties to it, certainly the present Kennedy Company purchased with the knowledge that this was a common boundary established as such by the patents many years prior to its purchase. As it defined the rights of the two companies in length on the lode, it necessarily included a definition and division of the extralateral right.

When two several mining companies agree upon a boundary line between the two companies and subsequently other parties purchase the several interests of the two companies with a knowledge of the boundary line so fixed, both parties are concluded by it and are estopped from denying the line.

McGee v. *Stone*, 9 Cal. 600.

Of one thing we are quite sure the common boundary A—B crossing the lode was fixed as the result of an adverse proceeding in the Land Office, and the agreement entered into in respect thereto as set forth in the agreed statement of facts. While we do not contend that this agreement could of itself control or modify the patent, we ought to be permitted to invoke the doctrine of estoppel, where the patent as issued under such circumstances practically carried the agreement into effect.

Conclusion.

We think we have fairly covered the field open to discussion. We have not, perhaps, taken occasion to traverse every statement made by counsel for plaintiff in error, or to criticise every case and its application to the questions presented. There is much in their brief which, from our standpoint, is foreign to the problems which confront us. Cases are cited which, in our judgment have no bearing. We have endeavored to confine ourselves to what, with the lights before us, we undrstand to be the pivotal questions involved. We are content to submit the case upon this presentation.

We respectfully submit that either the motion to dismiss should be granted, or that the judgment should be affirmed.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
W. J. McGEE,

Counsel for Defendant in Error.

APPENDIX.

OPINION OF TRIAL COURT.

In the Superior Court

OF THE

County of Calaveras,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY (A CORPORATION),

Plaintiff,

vs.

KENNEDY MINING AND MILLING COMPANY (A CORPORATION),

Defendant.

Formerly No. 1408 in the Superior Court of Amador County.

The plaintiff commenced two actions against the defendant in the Superior Court of Amador County, said actions being numbered respectively 1179 and 1408 in the Superior Court of said county. Upon the petition of the defendant the cases were transferred to the Circuit Court of the United States. Motion by plaintiff was subsequently made in the Circuit Court to remand both cases to the Superior Court of Amador County, which motion was granted. (*Argonaut Min. Co.* vs.

Kennedy Min. & Mill Co., 84 Fed. 1.) Upon the cases being remanded to the State Court they were removed to the Superior Court of Calaveras County for trial and determination.

The complaint in each action is in the form of an ordinary declaration in trespass, coupled with a prayer for an injunction. The first action was commenced August 11, 1894, to recover three hundred and twenty-five thousand dollars damages. The second action was commenced August 5, 1897, to recover one hundred and twenty-five thousand dollars damages for trespasses alleged to have been committed since the commencement of the first action.

The two causes were submitted to the Court upon agreed statements of fact and were both argued together. The underlying questions of fact in both cases are identically the same, and the opinion of the Court in one will apply with equal force to the other. There is a slight difference as to the defense in the first action from the defense in the second action, but both cases involve a trespass upon the same vein claimed by the plaintiff, and differ only as to the locality and the time of the alleged trespasses. The arguments of the attorneys were principally directed to the issues involved in the second action, No. 1408, and to those issues the Court will direct its opinion.

The facts of the said cause may be epitomized as follows: Plaintiff and defendant are both corporations organized and existing under and by virtue of the laws of the State of California. The plaintiff is the owner of the mining claim designated on Exhibit "A" as the "Pioneer" Mine, and the defendant is the owner of the mining claim designated on said Exhibit as the "Kennedy Mine;" both of said mining claims are patented. The Kennedy Mining Company (a corporation), the grantor of the defendant, filed its application for

patent for the Kennedy Mine on the 13th day of October, 1870; and the Pioneer Gold and Silver Mining Company (a corporation), the immediate predecessor in title of the plaintiff, filed its application for patent for the Pioneer Mine on the 13th day of January, 1871.

Thereafter, on the 15th day of March, 1871, the Surveyor General of the United States for the State of California issued his instructions to William L. McKim, deputy mineral surveyor, to make survey for patent of said Kennedy Mine, and in pursuance of said instructions said McKim, during the months of April and May, 1871, made and completed such survey, and on the 19th day of October, 1871, the said survey was approved by the Surveyor-General. On the 11th day of November, 1871, the said Kennedy Mining Company entered and paid for said mining claim so surveyed, and on the 29th day of July, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for the said mining claim. On the 28th day of December, 1886, said Kennedy Mining Company conveyed the said mine to the defendant, the Kennedy Mining and Milling Company.

On the 16th day of June, 1871, the United States Surveyor General for the State of California issued his instructions to said William L. McKim to make survey for patent for the Pioneer Quartz Mine, and on the 1st day of September, 1871, said McKim completed the said survey and the Surveyor General approved the same on the 21st day of December, 1871. On the 23d day of February, 1872, the Pioneer Gold and Silver Mining Company entered and paid for said mining claim, and the Receiver of the Land Office thereupon issued his duplicate receipt evidencing such entry and payment; and on the 12th day of August, 1872, the Government of the United States issued to the said Pioneer Gold and Silver Min-

ing Company a patent for the said Pioneer Quartz Mine. The plaintiff, the Argonaut Mining Company, became the owner of said mine by deed, executed July 3, 1893, by the said Pioneer Gold and Silver Mining Company.

The two mining claims are adjoining properties; the line A—B marked on the diagram "Exhibit A" is the northern end-line of the said Pioneer Quartz Mine as patented, to the extent of the length of said line, to-wit: seven (7) chains and sixty (60) links, is coincident with the southern end-line of the Kennedy Mine, as described in the patent of said Kennedy Mine. The course of said line A—B is north seventy-four (74) degrees, fifty-one (51) minutes east. The dotted line B—B' is the line A—B produced indefinitely in its own direction.

The plaintiff has sunk an incline shaft which has its collar or top in the Pioneer Millsite, at a point marked "S" on Exhibit "A," and descends into the earth downward from its collar easterly at an average angle of approximately sixty-two degrees from the plane of the horizon. Traversing said Kennedy and Pioneer Mines in a general northerly and southerly direction is a well-defined vein, varying in width from three inches to thirty feet; said vein dips and descends into the earth easterly at an average angle of approximately forty degrees from the plane of the horizon until it reaches a point in the Argonaut shaft about four hundred and forty feet below the collar thereof, below which point said vein dips and descends into the earth easterly at an average angle of approximately sixty-three degrees from the plane of the horizon. The general direction of the dip of said vein is indicated by the arrows on Exhibit "A." The general course of said vein is S. 19 degrees 14 minutes E. or N. 19 degrees 14 minutes W., as is apparent on the surface by the outcrop visible in

said Pioneer Mine. Said vein in its course southerly passes out of said Kennedy Quartz Mine, crossing the line A—B at a point thereon marked "Z" on Exhibit "A," and enters the Pioneer ground; thence pursuing its general southerly course toward the southern end-line of the Pioneer Quartz Mine, which it crosses.

The defendant within the Kennedy Millsite at the point marked " X " on Exhibit "A" has sunk a shaft, which is vertical or nearly so to the depth of three hundred and sixty-six feet, or thereabouts, at which depth it encounters the vein as it descends from the overlying apex. Thence said shaft is an incline following the vein on its dip to the present depth of approximately two thousand two hundred and fifty feet. From this shaft the defendant has extended levels and drifts southerly on said vein, which are shown in horizontal projections on Exhibit "A" marked 1450, 1550, 1650 and 1750 levels. Some of these levels have been extended on the vein southerly and beyond a vertical plane drawn through the line A—B produced in the direction of B'.

Between the 8th day of October, 1895, and the 12th day of December, 1895, the defendant extracted and converted to its own use two thousand six hundred and four tons of gold-bearing ore from the said vein southerly and beyond said vertical plane, but within the vertical boundaries of the Silva Quartz Mine delineated on Exhibit "A."

The gross value of the said ore so extracted and converted by defendant was the sum of sixty-two thousand two hundred and eighteen 45-100 dollars ($62,218.45). The aggregate cost of mining and milling the said ore was the sum of six thousand one hundred and nineteen 40-100 dollars ($6119.40), which amount plaintiff consents may be deducted from the gross value of the ore as above stated, in the event that the

Court should determine that plaintiff is entitled to recover in this action, leaving the sum of fifty-six thousand and ninety-nine 95-100 dollars ($56,099.95) in gold as the net profit realized by defendant from said ore.

The vein exposed in defendant's underground workings south of the vertical plane drawn through the line A—B produced in the direction of B' is the identical vein which has its top or apex in the Kennedy Quartz Mine and in the Pioneer Quartz Mine, and such vein is continuous from the top or apex in both mines downward to the lowest depths, and said vein at all points below the surface continues on its course in a general southerly direction indefinitely toward the south end-line of the Pioneer Quartz Mine, which it crosses, and the said 2604 tons of ore were extracted by defendant from said vein south of the vertical plane drawn through the line A—B—B'. Said vein is the identical vein mentioned in the Kennedy patent as the Kennedy vein or lode and in the Pioneer patent as the Pioneer vein or lode.

The Silva Quartz Mine delineated on Exhibit "A" as Lot No. 86, lies to the east of the Pioneer and Kennedy Mines. The surface of the said Silva Quartz Mine overlies so much of the dip of the Kennedy and Pioneer vein as may be found between vertical planes drawn downward through the boundaries of the said Silva Quartz Mine. The defendant, the Kennedy Mining and Milling Company, is the owner of the said Silva Quartz Mine by virtue of a quartz mining patent issued to it on the 6th day of February, 1893.

No part of the ore bodies in dispute lie between vertical planes drawn downward through the end-lines of the Kennedy Mine. The defendant, the Kennedy Mining and Milling Company, makes no claim of right or title to the ores in dispute by reason of its ownership of the Kennedy Mine;

but it claims title to the ores in dispute by reason of its ownership of the Silva Quartz Mine. The patent for the Silva Mine is in the usual form of patents for quartz-mining claims, and contains the usual exceptions and reservations. It is presumptively based upon a vein having its apex within the exterior boundaries of the Silva Mine. Like all quartz-mining patents it contains the usual reservation that the premises granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge the top or apex of which lies outside of the boundaries of the granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

The ore bodies in dispute are within the vertical boundaries of the said Silva Quartz Mine, but are a part of the vein having its top or apex within the Pioneer Quartz Mine, which vein on its dip to the east extends under the surface of the Silva Mine.

At common law a grant of land carries with it all beneath the surface of the earth. In the absence of some one having a better right to the vein which on its dip underlies the surface of the Silva Quartz Mine, the defendant would own it. The defendant, the Kennedy Mining and Milling Company, has the right to say, in the language of Judge Hawley:

> " Hands off any and everything within my surface " lines extending vertically downward, until you prove " that you are working upon and following a vein which " has its apex within your surface claim, of which you " are the owner." (*Cons. Wyoming M. Co.* vs. *Champion* " *M. Co.*, 63 Fed. 540.) For " within the lines of each " location the owner shall be regarded as having full " right to all that may be found until some one can show " a clear title to it as a part of some lode or vein having " its top or apex in other territory. In other words, we " may say that there is a presumption of ownership in

" every locator as to the territory covered by his location,
" and within his own lines he shall be regarded as the
" owner of all valuable deposits until some one shall
" show by a preponderance of testimony that such deposit
" belongs to another lode having its top or apex else-
" where."

Leadville Mining Co. vs. *Fitzgerald*, 4 Mor. Min. Rep. 380;

See also, *King* vs. *Amy and Silversmith Min. Co.*, 152 U. S. 222;

Duggan vs. *Davey*, 26 N. W. Rep. 887;

Doe vs. *Waterloo Min. Co.*, 54 Fed. 935;

Chessman vs. *Shreve*, 37 Fed. 36.

A party claiming the right to follow a vein on its dip under the surface of another person's mining claim is required to show by a preponderance of evidence that he has that right by virtue of his ownership of the vein which has its top or apex within his surface claim, and to which is attached under the law an extralateral right.

The end-lines of the Pioneer Quartz Mine as patented are not parallel. The northern end-line diverges substantially toward the north from a direction parallel to the southern end-line; such divergence being to the extent of fourteen (14) degrees and forty-five (45) minutes northerly from a direction parallel to the southern end-line; such divergence between the said end-lines is easterly and in the direction of the dip of the Pioneer vein.

By reason of such non-parallelism of the end-lines of the Pioneer Mine, the defendant claims that no extralateral right is attached to the Pioneer, and that the plaintiff has no right to follow the Pioneer vein beyond the vertical boundaries of the Pioneer Mine.

The controlling question, then, in this case is: Has the plaintiff the right to follow the Pioneer vein on its dip beyond

the vertical plane drawn through the eastern side-line of the Pioneer Mine? This question is a most important one, and the Court has given to it its most careful and earnest consideration.

The patent for the Pioneer Quartz Mine recites that in pursuance of the Act of Congress approved July 26, 1866, entitled "An Act granting the right of way to ditch and canal "owners over the Public Lands, and for other purposes," the Act amendatory thereof, approved July 9, 1870, and the Act approved May 10, 1872, entitled "An Act to promote the "development of the mining resources of the United States," there had been deposited in the General Land Office of the United States the plat and field notes of the survey of the Pioneer Gold and Silver Mining Company upon the Pioneer Quartz Lode bearing gold, accompanied by the certificate of the Register of the Land Office at Sacramento, in the State of California, whereby it appears that in pursuance of said Acts of Congress, the Pioneer Gold and Silver Mining Company did on the 23rd day of February, 1872, enter and pay for said mining claim or premises, being mineral entry No. 63 in the series of said office designated by the Surveyor General as Lot No. 48 in the Jackson Mining District, in Amador County, California, in the district of lands subject to sale at Sacramento, embracing twenty-two and twenty-two hundredths (22.22) acres of land more or less, and which is fully described by metes and bounds.

The following is the granting clause of the patent with the conditions and stipulations annexed:

> " Now, know ye, that the United States of America, in " consideration of the premises and in conformity with " the said Acts of Congress, have given and granted and " by these presents do give and grant unto the said Pio- " neer Gold and Silver Mining Company, and to their " successors and assigns, the said mining premises here-

" inbefore described as Lot number forty-eight (48), " embracing a portion of the northeast quarter of section " twenty (20) in Township six (6) north of range eleven " (11) east, Mt. Diablo Meridian, with the exclusive " right of possession and enjoyment of all the land in- " cluded within the exterior lines of said survey, not " herein expressly excepted from these presents, and of " fifteen hundred and eighty-nine 94-100 linear feet of " the said Pioneer Quartz Vein, lode, ledge or deposit as " hereinbefore described *throughout its entire depth, al-* " *though it may enter the land adjoining*, and of all the " veins, lodes, ledges or deposits throughout their entire " depth, the tops or apexes of which lie inside the exteri- " or boundary lines of said survey at the surface, ex- " tended downward vertically, although such veins, lodes, " ledges or deposits in their downward course may so far " depart from a perpendicular as to extend outside the " vertical side-lines of said survey;

" Provided, that the right of possession hereby granted " to such outside parts of said veins, lodes, ledges or de- " posits shall be confined to such portions thereof as lie " between vertical planes drawn downward through the " end-lines of said survey at the surface so continued in " their own direction that such vertical planes will inter- " sect such exterior parts of said veins, lodes, ledges or " deposits.

"And, provided further, that nothing in this convey- " ance shall authorize the grantees herein, their suc- " cessors or assigns, to enter upon the surface of the min- " ing claim owned or possessed by another.

"To have and to hold said mining premises, together " with all the rights, privileges, immunities and appur- " tenances of whatsoever nature thereunto belonging, " unto the said Pioneer Gold and Silver Mining Com- " pany, and their successors and assigns forever, subject, " nevertheless, to the following conditions and stipula- " tions:

" First. That the grant hereby made is restricted to " the land hereinbefore described as Lot number forty- " eight (48) with fifteen hundred and eighty-nine and " 94-100 linear feet of the Pioneer Quartz Vein, lode, " ledge or deposit throughout its entire depth as afore- " said, together with all other veins, lodes, ledges or de-

" posits throughout their entire depth as aforesaid, the " tops or apexes of which lie inside of the exterior lines " of said survey, and to which no valid adverse claim " existed on the 10th day of May, eighteen hundred and " seventy-two.

" Second. That the premises hereby conveyed, with " the exception or the surface, may be entered by the " proprietor of any other vein, lode, ledge or deposit, " the top or apex of which lies outside of the exterior " limits of said survey, should the same in its downward " course be found to penetrate, intersect, extend into, or " underlie the premises hereby granted, for the purpose " of extracting and removing the ore from such other " vein, lode, ledge or deposit.

" Third. That the premises hereby conveyed shall be " held subject to any vested and accrued water rights for " mining, agricultural, manufacturing or other purposes, " and rights to ditches and reservoirs used in connection " with such water rights as may be recognized and ac- " knowledged by the local laws, customs and decisions of " courts.

" Fourth. That in the absence of necessary legisla- " tion by Congress the Legislature of California may " provide rules for working the mining claim or premises " hereby granted, involving easements, drainage, and " other necessary means to its complete development."

It is argued that the said patent for the Pioneer Quartz Mine in so far as it attempts to grant an extralateral right is absolutely void, as being beyond the jurisdiction of the Land Department of the United States to make such a grant for the reason of the non-parallelism of the end-lines of the Pioneer Quartz Mine.

Numerous authorities are cited to the effect that if the officers of the Land Department acted without authority of law, then their acts are void for want of power to issue the patent. Of the correctness of this proposition there can be no question. The authorities are uniform in holding that a patent issued by the Land Department of the United States to land

over which that Department has no power of disposition is absolutely void and conveys no title whatsoever.

New Dunderberg Min. Co. vs. *Old*, 79 Fed. 598;
Rose vs. *Richmond Min. Co.*, 17 Nev. 25;
Reichart vs. *Felps*, 6 Wall. 160;
Best vs. *Polk*, 18 Wall. 112;
Sherman vs. *Buick*, 3 Otto, 209;
Fancoeur vs. *Newhouse*, 40 Fed. 618;
Smelting Co. vs. *Kemp*, 104 U. S. 641;
Wright vs. *Rosebury*, 121 U. S. 519;
Davis, Adm'r., vs. *Wiebbold*, 139 U. S. 507;
Doolan vs. *Carr*, 135 U. S. 624;
Deffeback vs. *Hawke*, 115 U. S. 392;
Larkin vs. *Dolly*, 53 Fed. 333;
Larkin vs. *Roberts*, 54 Fed. 461.

The plaintiff's title to the Pioneer Quartz Mine was derained under locations made prior to the passage of the Act of May 10, 1872; in other words, its right accrued under the Act of Congress of July 26, 1866. This Act was the first general legislation in respect to the disposal of mines. By the first section of the said Act it is provided :

> "That the mineral lands of the public domain, both "surveyed and unsurveyed, are hereby declared to be "free and open to exploration and occupation by all "citizens of the United States and those who have de- "clared their intention to become citizens, subject to "such regulations as may be prescribed by law, and "subject also to the local customs and rules of miners, in "the several mining districts, so far as the same may not "be in conflict with the laws of the United States."

The second section gave to the claimant of a vein or lode bearing gold, silver, cinnabar or copper, the right to file in the local land office a diagram of the same, so extended lat-

erally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dip, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition. Section 3 set forth the steps necessary to be taken in order to obtain a patent, and provided that such plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued. Section 4 among other things provided:

> "That no location hereafter made shall exceed 200 "feet in length along the vein for each locator, with an "additional claim for discovery to the discoverer of the "lode, with the right to follow such vein to any depth "with all its dips, variations and angles; together with "a reasonable quantity of surface for the convenient "working of the same, as fixed by local rules; and pro- "vided further, that no person may make more than one "location on the same lode, and not more than 3,000 feet "shall be taken in any one claim by any association of "persons."

As before stated the patent for the Pioneer Quartz Mine was issued on the 12th day of August, 1872. But all the steps necessary to obtain a patent under the Act of 1866 were had and taken by plaintiff's grantor, the Pioneer Gold and Silver Mining Company prior to the passage of the Act of Congress of May 10, 1872. By sections 2 and 3 of the Act of July 26, 1866, it was provided that a claimant of a lode or vein could file a diagram of the same so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and enter such tract and receive a patent therefor, granting such mine together with the right to follow such

vein or lode with its dips, angles and variations to any depth although it may enter the land adjoining, which land adjoining shall be sold subject to this condition; that upon the filing of this diagram and the posting of the same together with a notice of intention to apply for a patent, the Register of the Land Office should publish and post the notice for the period of ninety days, and after the expiration of said period if no adverse claim had been filed the Surveyor General should on application of the party survey the premises, make a plat thereof endorsed with his approval, designate the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment of five dollars per acre, together with the costs of survey, plat and notice, and giving satisfactory evidence that the diagram and notice had been posted for the period of ninety days, the Register should transmit to the General Land Office the plat, survey and description and a patent should issue for the same thereupon.

All of this had been done by the Pioneer Gold and Silver Mining Company long before the Act of May 10, 1872, was passed. On the 23rd day of February, 1872, the claimant of the Pioneer Mine entered and paid for the said mining claim, and the Receiver of the Land Office on said day issued his duplicate receipt evidencing such entry and payment. As soon as this payment was made the Pioneer Gold and Silver Mining Company was entitled to a patent. When the Act of May 10, 1872, was, passed, plaintiff's grantor held the obligation of the Government to issue to it a patent for the Pioneer Mine under the Act of July 26, 1866.

> " By the mining laws of the United States three dis-
> " tinct classes of title are created, viz: 1—Title in fee
> " simple; 2—Title by possession; 3—The complete
> " equitable title. The first vests in the grantee of the

"Government an indefeasible title, while the second "vests a title in the nature of an easement only. The "first being an absolute grant by purchase and patent "without condition, is not defeasible, while the second, "being a mere right of possession and enjoyment of "profits without purchase and upon condition may be "defeated at any time by the failure of the party in pos- "session to comply with the condition, viz: To perform "the labor or make the annual improvements required "by the statute. The equitable title accrues immediately "upon purchase, for the entry entitles the purchaser to a "patent, and the right to a patent once vested is equiv- "alent to a patent issued."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 428.

"When the price is paid the right to a patent immedi- "ately arises. If not issued at once it is because the "magnitude of the business of the Land Department "causes delay. But such delay, in the mere administra- "tion of affairs, does not diminish the rights flowing from "the purchase, or cast any additional burdens on the "purchaser, or expose him to the assaults of third persons."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 431, 432.

In the case of *Stark* vs. *Starr*, 6 Wall. 402, the United States Supreme Court held:

"The right to a patent once vested is treated by the "Government, when dealing with the public lands, as "equivalent to a patent issued. When, in fact, the pat- "ent does issue it relates back to the inception of the "right of the patentee, so far as may be necessary to cut "off intervening claimants."

Carroll vs. *Safford*, 3 How. 441, it is said that—

"Lands which have been sold by the United States "can in no sense be called the property of the United "States. They are no more the property of the United "States than lands patented. So far as the rights of "the purchaser are considered, they are protected under "the patent certificate as fully as under the patent. * * "When sold, the Government, until the patent shall "issue, holds the mere legal title for the land in trust for "the purchaser."

In *Con. Wyoming Gold Min. Co.* vs. *Champion Min. Co.*, 63 Fed. 540, and in *Walrath* vs. *Champion Min. Co.*, 63 Id. 552, it is held by Judge Hawley that "a receipt and certificate of "purchase from the United States Land Office is the equiva- "lent of a patent," and to the same effect is the decision of the United States Supreme Court in *Deffeback* vs. *Hawke*, 115 U. S. 392.

In *People* vs. *Shearer*, 30 Cal. 645, 648, the Court, speaking through Mr. Justice Sawyer, said:

> "By the payment and acceptance of the purchase "money the claimant has performed everything to be done "by him, and the purchase has been completed. The pay- "ment, receipt of the purchase money, and the issuing "of a receipt and certificate of entry therefor, constitute "an entry of the land. The contract of purchase is ex- "ecuted and the land is his, and no longer belongs to the "Government. The conveyance has not been made, but "the Government of the United States only holds the "legal title in trust for the purchaser. The land no "longer constitutes a part of the public domain. The "United States have ceased to have any proprietary in- "terest in it. It is henceforth private property. * *."

When a party pays the purchase money and receives the certificate of sale, he is the owner of the land.

> "The United States has ceased to have any pecuniary "interest in it. They hold the naked, dry, legal title "for the holder of the certificate."
>
> *Hamilton* vs. *Southern Nevada Mining Co.*, 13 Sawy. 113, 33 Fed. 562;
>
> *Union M. Co.* vs. *Danberg*, 2 Sawy, 455;
>
> *Amador Medean Gold M. Co.* vs. *South Spring Gold Min. Co.*, 13 Sawy. 523, 36 Fed. 668, 670;
>
> *Aurora Hill Cons. Min. Co.* vs. *85 Min. Co.*, 12 Sawy. 355, 34 Fed. 515.

In *Wirth* vs. *Branson*, 98 U. S. 118, Justice Bradley, who delivered the opinion of the Court, speaking of the value, force, and effect of the proceedings anterior to the issuance of a patent, says:

"The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof. * * * The public faith has been pledged to him. * * *"

The authorities are uniform in holding that when a person pays the Government the purchase price of the land and receives the certificate of purchase, he is then vested with the complete equitable title, and the mere dry, naked, legal title remains in the Government in trust for the holder of the equitable title, in whom is vested all the rights and obligations of ownership.

In *Benson Min. Co.* vs. *Alta Min. Co.*, 145 U. S. 428, Mr. Justice Brewer, speaking for the United States Supreme Court, uses the following language at page 434:

"There is no conflict in the rulings of this Court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and no third party can acquire from the Government interests as against him."

By the foregoing authorities it is abundantly established that when, on the 23d day of February, 1872, the purchase price was paid and the certificate of purchase issued, the Pioneer Gold and Silver Mining Company was invested with the complete equitable title and held the obligation of the Government to issue to it a patent for the Pioneer Mine. A patent, when granted, relates back to the first valid initial step, which is the foundation of the right, and in pursuance of which the patent is issued.

Kahn vs. *The Old Telegraph Min. Co.*, 2 Utah, 174, 11 Mor. Min. Rep. 645;
Benson Min. Co. vs. *Alta Min. Co.*, 145 U. S. 428, 434;
Stark vs. *Starr*, 6 Wall. 402;
Ely vs. *Frisbie*, 17 Cal. 250;
Yount vs. *Howell*, 14 Cal. 465;
Touchard vs. *Crow*, 20 Cal. 150;
Aurora Hill Co. vs. *85 Min. Co.*, 12 Sawy. 355, 34 Fed. 515;
Eureka Min. Co. vs. *Richmond Min. Co.*, 4 Sawy. 302.

As the plaintiff's grantor received its certificate of purchase prior to the passage of the Act of May 10, 1872, and the patent which was subsequently issued related back to the inception of the rights of the patentee, it is clear to my mind that the extralateral rights of the plaintiff must be determined under the Act of July 26, 1866. When the Act of May 10, 1872, was passed, the plaintiff's grantor was already the owner of the absolute equitable title to the Pioneer Quartz Mine, and had been such owner ever since the 23rd day of February, 1872, the day on which it paid the Government of the United States the purchase price of the land. The fact that the patent was not issued until the 12th day of August, 1872, is, in my judgment, wholly immaterial. If, on account of the magnitude of the business in the Land Department, the patent was not issued immediately after the payment, such delay will not cast additional burdens upon the purchaser, nor deprive him of any right which he otherwise would have had. If by the Act of July 26, 1866, parallelism of end-lines was not required, then my opinion is that the plaintiff is entitled to extralateral rights irrespective of the provision of the Act of May 10, 1872, which makes parallelism in end-lines an essential requisite to the existence of any right in the locator or patentee to follow his vein on its dip outside of the vertical planes drawn through the side-lines.

As before stated the Act of July 26, 1866, was the first general legislation looking to the disposal of mines. Before its passage the rights of miners upon the public domain of the United States were governed by the local rules and customs of miners. The act did not interfere with those rights, but was confirmatory thereof. (*Walrath* vs. *Champion Min. Co.*, 63 Fed. 540; *Carson City G. & S. Min. Co.* vs. *North Star Min. Co.*, 83 Fed. 658; *Eureka Cons. Min. Co.* vs. *Richmond Min. Co.*, 3 Sawy. 302.) In no provision of the said act is there any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent, and the general purpose of the act was to give the sanction of the Government to those possessory rights, acquired under the local customs, laws, and decisions of the courts. (*Jennison* vs. *Kirk*, 98 U. S. 453.) Under these rules the lode was the principal thing, and the surface ground was a mere incident to the same for the convenient working thereof. (*Walrath* vs. *Champion Min. Co.*, 63 Fed. 540; *Golden Fleece G. & S. Min. Co.* vs. *Cable G. & S. M. Co.*, 12 Nev. 312; 1 Mor. Min. Rep. 120.) The location was made for a certain number of feet of the lode, and the locator was entitled to the number of feet claimed in whatever direction the lode was found with its dips, spurs, and angles. (*Carson City G. & S. Min. Co.* vs. *North Star Min. Co.*, 83 Fed. 658.) By the Act of 1866 the claimant of a lode who had occupied and improved the same according to these local rules and customs of miners, and having expended in actual labor and improvement thereon an amount of not less than one thousand dollars, and in regard to whose possession there was no controversy or opposing claim, could receive a patent for the same from the Government of the United States. A

party applying for a patent under said act was required to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract to receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, etc. Under the terms of the Act of July 26, 1866,

> " However tortuous might be the course of the lode, " the claimant had a perfect right to follow it up and " prepare his diagram so as to include it, together with " the surface ground on each side thereof allowed by " local laws. There is no language in the act that " requires the diagram to be in form of a parallelogram " or in any other particular form."

Wolfley et al. vs. *Lebanon Min. Co.*, 4 Colorado, 112; 13 Mor. Min. Rep. 285;

Carson City G. & S. Min. Co. vs. *North Star Min. Co.*, 83 Fed. 658, 669.

> "As might be expected, the patents issued under this " statute described surface areas very different and some- " times irregular in form. Often they were like a broom, " there being around the discovery shaft an amount of " ground deemed large enough for the convenient work- " ing of the mine, and a narrow strip extending there- " from as the handle of a broom. This strip might be " straight or in a curved or irregular line, following, as " was supposed, the course of the vein. Sometimes the " surface claimed and patented was a tract of consider- " able size, so claimed with the view of including the " apex of the vein, in whatever direction subsequent ex- " plorations might show it to run. And again, where " there were local rules giving to the discoverer of a mine " possessory rights in a certain area of surface, the patent " followed those rules and conveyed a similar area."

Del Monte Min. Co. vs. *Last Chance Min. Co.*, 171 U. S. 55, 64.

There is no provision of said Act that requires the end-lines of a mining claim to be parallel, nor is there any intention manifested to make parallelism essential. Up to the passage of the Act of May 10, 1872, there was nothing whatever in the statute which called upon the locator to make his end-lines parallel, and it is only by virtue of the Act of May 10, 1872, that parallelism was made essential. The local rules and customs of the miners before the passage of that Act did not require it, nor did the Act of Congress of July 26, 1866. It is said by Mr. Justice Brewer in *Del Monte Mining Co.* vs. *Last Chance Min. Co.* (171 U. S. 67) that "there is no in-"herent necessity that the end-lines of a mining claim should "be parallel." They must be parallel because the statute so specifically provides (Section 2320, Revised Statutes.) Parallelism of end-lines is purely a requirement of the Act of 1872. The object of the statute in this respect was no doubt to prevent a party from claiming more outside his lines than within them (*Doe* vs. *Sanger*, 83 Cal. 203.) This was one of the evils the Act of 1872 provided against. But a right previously acquired was not interfered with by the Act of May 10, 1872. Section 9 of said Act is as follows:

"That sections one, two, three, four and six of an 'Act "'granting the right of way to ditch and canal owners "'over the public lands and for other purposes,' ap-"proved July 26, 1886, are hereby repealed, *but such "repeal shall not affect existing rights.* Applications for "patents for mining claims now pending may be prose-"cuted to a final decision in the General Land Office; "but in such cases, where adverse rights are not affected "thereby, patents may issue in pursuance of the provis-"sions of this Act; and all patents for mining claims "heretofore issued under the Act of July 26, 1866, shall "convey all the rights and privileges conferred by this "Act, where no adverse rights exist at the time of the "passage of this Act."

(Section 2328 *Revised Statutes.*)

The intent of Congress is expressly declared by said section, to preserve unaffected all existing rights acquired under the Act of 1866. Congress, instead of designing to interfere with the previously acquired rights, expressly enlarges them, as are the rights of all prior patentees under the Act of 1866; by granting all veins, lodes and ledges having their tops or apexes within the exterior boundaries of their surface claims. Thus a patent under the Act of 1866 conveyed only the one vein or lode applied for; all other veins were expressly reserved. This said Act provided that the

> " plat, survey, or description shall in no case cover more
> " than one vein or lode, and no patent shall issue for
> " more than one vein or lode, which shall be expressed
> " in the patent issued."
>
> (Section 3, *Act of 1866.*)

The effect of the Act of 1872 (where no adverse rights existed) was to grant to such prior patentees all other

> " veins, lodes and ledges throughout their entire depth,
> " the top or apex of which lies inside of such surface
> " lines extended downward vertically in whatever course
> " or direction they might run."
>
> *Walrath* vs. *Champion Min. Co.*, 63 Fed. 552, 557.

That the intent of Congress was not to abridge any of the rights of the miners acquired under the Act of 1886 is further manifested by Section 12 of the Act of 1872, wherein the following language is used:

> " Nothing in this Act shall be construed to enlarge or
> " affect the rights of either party in regard to any prop-
> " erty in controversy at the time of the passage of this
> " Act, or of the Act entitled 'An Act granting the
> " 'right of way to ditch and canal owners over the pub-
> " 'lic lands, and for other purposes,' approved July 26,
> " 1866, *nor shall this Act affect any right acquired under*
> " *said Act.*"

And Section 16 provides:

> "That all Acts and parts of Acts inconsistent here-
> "with are hereby repealed: *provided, that nothing con-*
> "*tained in this Act shall be construed to impair in any*
> "*way, rights or interests in mining property acquired un-*
> "*der existing laws.*"

The proviso contained in said Section 16 is embodied in the same terms in Section 2344 of the Revised Statutes of the United States.

That the policy of Congress was to preserve previously acquired rights and not to impair them, sufficiently appears by Section 5597 of the Revised Statutes, which section reads as follows:

> "The repeal of the several Acts embraced in said re-
> "vision *shall not affect any act done or any right accruing*
> "*or accrued*, or any suit or proceeding had or commenced
> "in any civil cause before the said repeal, *but all rights*
> "and liabilities under said Acts *shall continue and may*
> "*be enforced in the same manner as if said repeal had not*
> "*been made.* * * *"

It is apparent to my mind from the foregoing provisions of the Statute that the intention of Congress was not to abridge but to preserve and continue the rights of the miners acquired under the provisions of the Act of July 26, 1866.

The Act of May 10, 1872, did not curtail and was not intended to curtail or modify any rights acquired under the Act of 1866. None of its provisions are capable of that construction, nor could the Court so construe the Act as to give it a retrospective effect and thereby impair vested rights. Of course, such being the case, the extralateral rights of the plaintiff must be determined under the provisions of the Act of 1866.

As before stated there is no provision of the Act of 1866 that requires the end-lines of a mining claim to be parallel,

nor is there any intention manifested by said Act to make parallelism essential. That the Act of 1866 (under the provisions of which plaintiff's rights accrued) did not require parallelism of end-lines has been adjudged in the following cases:

Eureka Cons. Min. Co. vs. *Richmond Min. Co.*, 4 Sawy. 302;
Carson City G. & S. Min. Co. vs. *North Star Min. Co.*, 83 Fed. 659, 669;
Walrath vs. *Champion Min. Co.*, 63 Fed. 552;
Cons. Wyoming Gold Min. Co. vs. *Champion Min. Co.*, 63 Fed. 540;
Iron Silver Min. Co. vs. *Elgin Min. Co.*, 118 U. S. 196;
Carson City G. & S. Min. Co. vs. *North Star Min. Co.*, 73 Fed. 597.

Upon the question of parallelism of end-lines under the Act of 1866 the case of *Eureka Cons. Min. Co.* vs. *Richmond Min. Co.* (4 Sawy. 302) is important. The plaintiff, the Eureka Mining Company, was the owner of several locations, among which were the Champion, At Last and the Lupita or Margaret Mining Claims. The Champion was patented with parallel end-lines. But the end-lines of the At Last and the Lupita or Margaret as patented were not parallel, *but diverged in the direction of the dip of the vein.* The Champion was located in May, 1870, and was patented in 1872. It did not appear in the record when the At Last and the Lupita or Margaret claims were located. The patent shows that the Lupita was entered and paid for on the 14th of February, 1877, and the patent issued on the 30th day of March, 1877. The At Last, as appears by the patent, was entered and paid for on the 29th day of March, 1873, and the patent issued on the 12th day of December, 1876. The defendant, the Richmond Mining Company, made objection to the validity of the patents to the At Last and the Lupita or Margaret, because the end-lines were not parallel, as required by the provisions

of the Act of 1872. To this contention of the Richmond Company Mr. Justice Field said:

> "But to this objection there are several obvious answers. In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the Acts of 1866, where such parallelism in the end-lines of the surface locations were not required. The presumption of law is that the officers of the Executive Department specially charged with the supervision of applications for mining patents and the issue of such patents did their duty; and in an action of ejectment mere surmises to the contrary will not be listened to. If, under any possible circumstances, a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences. In the second place the provision of the Statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction. Its object is to secure parallel end-lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations on the length of the lode. In the third place, the defect alleged does not concern the defendant, and no one but the Government has the right to complain."

Unquestionably the above doctrine of the Eureka case, in so far as it holds that the provision of the Statute of 1872 requiring the end-lines of mining claims to be parallel, is merely directory and that no consequence is attached to a deviation from its direction, has been modified by the United States Supreme Court.

Iron Silver Mining Co. vs. *Elgin Min. Co.*, 118 U. S. 196;
Del Monte Min. Co. vs. *Last Chance Min. Co.*, 171 U. S. 55.

The defendant, the Richmond Mining Company, also held several patents issued to it upon different locations, but it specially relied upon the patents to the Richmond and the Tip Top claims. It alleged that these patents were issued upon locations made prior to any upon which the patents to the Eureka Company were issued; and its contention was that inasmuch as the croppings of the vein were within the surface of the patented locations it had the right to follow the vein wherever it went, although it be outside of the end-line planes. Its position was that "whenever under the law of 1866 a "location was made on a ledge or vein, a right was acquired "to follow the vein wherever it might lead, without regard to "the end-lines of the location." In the discussion of this contention of the Richmond Company, Mr. Justice Field, among other things, said:

> "Now, as neither the rules of miners in Eureka Min- "ing District, nor the Act of 1866, in terms speak of "end-lines to locations made on ledges, nor in terms "impose any limitation upon miners following these "veins wherever they may lead, it is contended that no "such limitation can be considered as having existed and "be enforced against the defendant. The Act of 1866, "it is said, recognizes the right of the locator to follow "his vein outside of any end-lines drawn vertically down "when it permits him to obtain a patent granting his "mine, 'together with the right to follow such vein or "'lode, with its dips, angles, and variations, to any depth, "'although it may enter the land adjoining, which land "'shall be sold subject to this condition.'"
>
> "It is true that end-lines are not in terms named in "the rules of the miners, but they are necessarily "implied, and no reasonable construction can be given "to them without such implication. What the miners "meant by allowing a certain number of feet on a ledge "was that each locator might follow his vein for that "distance on the course of the ledge, and to any depth "within that distance. So much of the ledge he was

"permitted as lay within vertical planes drawn down "through the end-lines of his location, and could be "measured anywhere by the feet on the surface. If this "were not so, he might, by the bend of his vein, hold "under the surface along the course of the ledge double "and treble the amount he could take on the surface. "Indeed, instead of being limited by the number of feet "prescribed by the rules, he might, in some cases, oust "all his neighbors and take the whole ledge. No con- "struction is permissible which would substantially defeat "the limitation of quantity on a ledge, which was the "most important provision in the whole system of rules."

The Court is here speaking of the claim of the Richmond Company, under the Act of 1866, to follow its vein wherever it might lead, without regard to the end-lines of the location. In the consideration of the Eureka case the fact must not be lost sight of that the Court is here dealing with patented locations. Whatever may have been the rights of a locator under the Act of 1866, to follow his vein or lode wherever it might lead, still when he received a patent, those rights were controlled by the patented lines, and he could not follow the vein on its course beyond those lines. The contention of the Richmond Company was that it had the right to follow the vein on its strike beyond the end-lines, and this Mr. Justice Field held could not be done, because if this were so, a party "might, by *the bend of his vein*, hold under the surface, along "the course of the ledge double and treble the amount he "could take on the surface." This does not mean the dip of the vein, but it means a bend on its strike, a change in its course, where it may pass out of and beyond the surface location. The decision in the Eureka case gives to the plaintiff all the ground in dispute lying within planes drawn vertically downward through the end-lines of the plaintiff's patented locations. The end-lines of the At Last and the Lupita or Margaret claims, as before stated, were not par-

allel, *but diverged in the direction of the dip of the vein;* and to hold that the language above quoted from the Eureka case requires parallelism of end-lines under the Act of 1866, to support the extralateral right would be to ignore the ultimate conclusion reached by the Court. Therefore this language of Mr. Justice Field must be applied exclusively to the contention of the Richmond Company to follow the vein on its strike beyond the end-line planes. This doctrine of the Eureka case against the right claimed by the Richmond Company to follow the vein beyond the end-line planes is but the forerunner of the following decisions that subsequently defined the rule that you could not follow the vein on its strike beyond your surface boundaries.

Mining Co. vs. *Tarbet*, 98 U. S. 463;
Argentine Min. Co. vs. *Terrible Min. Co.*, 122 U. S. 478;
King vs. *Amy and Silversmith Min. Co.*, 152 U. S. 222;
Iron Silver Min. Co. vs. *Elgin Min. Co.*, 118 U. S. 196.

See, also—

Wolfley vs. *Lebanon Min. Co.*, 4 Colo. 112, 13 Mor. Min. Rep. 282;
New Dunderberg Min. Co. vs. *Old*, 79 Fed. 598;

It is contended by the defendant in the case at bar that the Eureka case was substantially decided upon the ownership by the Eureka Company of the Champion claim alone; a mining claim which had parallel end-lines. With this contention of the defendant I am unable to agree. It is true that the Champion had parallel end-lines, but the decision of the Court was not based on the ground of the ownership by the Eureka Company of the Champion alone, but was based on the ground of its ownership of the Champion, the At Last and the Lupita or Margaret claims.

The Eureka Company was the patentee of several locations, but for the purposes of the action, Mr. Justice Field said, it

was only necessary to refer to three of them—the Champion, the At Last and the Lupita or Margaret claims. The diagram accompanying the opinion (4 Sawy. 304) shows the relative positions of these three mining properties. The Court found that the *top or apex of the lode was within the surface-lines of these mining claims* (Finding of Fact No. 17.) And as the ground in dispute was within planes drawn vertically downward through the end-lines of those patented locations Justice Field held that the ground was the property of the Eureka Company, and that it was entitled to judgment for its possession.

The Eureka case went to the Supreme Court of the United States, and the judgment in favor of the Eureka Mining Company was affirmed. The Supreme Court, after passing upon the compromise agreement, said:

> "The Richmond Company is in no condition to dis-
> " pute the validity of the Eureka's patents for the At
> " Last and the Margaret because the end-lines of the
> " surveys are not parallel, as it has agreed with the Eu-
> " reka, for a consideration, not to work in the limestone
> " to the south and east of the compromise line. Upon
> " the face of the patents the United States has granted to
> " the Eureka the right to all veins, lodes and deposits,
> " the tops or apexes of which lie on the inside of its sur-
> " veys as patented, throughout their entire depth, and
> " wherever they may go, provided it keeps itself within
> " the end-lines of the surveys. The finding that the
> " ground in dispute is within the end-lines and that the
> " apex is within the surface-lines, settled the rights of
> " the parties between themselves as well under their pat-
> " ents as under their compromise agreement."
>
> *Richmond Min. Co.* vs. *Eureka Min. Co.*, 103 U. S. 839, 847.

There is nothing in *Mining Co.* vs. *Tarbet*, 98 U. S. 463, as I read the decision, that requires parallelism of end-lines under the Act of 1866, nor does the decision, as I understand it,

qualify the doctrine of the Eureka case (4 Sawy. 302.) In *Mining Co.* vs. *Tarbet*, commonly called the "Flagstaff case," a surface location was made which was one hundred feet wide by twenty-six hundred feet long. This location was known as the Flagstaff Mine, and for which the plaintiff in error held a patent issued under the Act of 1866. It lay across the lode, not along it. The location was made on the supposition that it followed the course of the ledge, but subsequent developments showed that it crossed the vein at right angles, so that there was but one hundred feet of the vein within the surface boundaries.

The claim of the plaintiff in error was of the ownership of 2,600 feet in length of such vein. In other words, the contention was that it was the lode which was granted, and that the surface ground was a mere incident for the convenient working of the lode. This contention of the owner of the Flagstaff was presented in the following instruction propounded by the plaintiff in error in the trial court, which instruction the Court refused:

> "By the Act of Congress of July 26, 1866, under "which all these locations are claimed to have been "made, it was the vein or lode or mineral that was "located and claimed; the lode was the principal thing "and the surface area was a mere incident for the con- "venient working of the lode; the patent granted the "lode as such irrespective of the surface area which an "applicant was not bound to claim; it was his conven- "ience for working the lode that controlled his location "for his surface area; and the patentee under that Act "takes a fee-simple title to the lode to the full extent "located and claimed under said Act."

The Supreme Court of the United States in affirming the judgment of the lower court held that in such case the so-called side-lines were in fact end-lines and that the locator was restricted to so much of the lode as his claim covers.

That the right to follow the dip outside of the side-lines was based on the hypothesis that the direction of those lines corresponded substantially with the course of the lode or vein at its apex on or near the surface. "It was not the intent of "the law to allow a person to make his location crosswise of a "vein so that the side-lines shall cross it and thereby give "him the right to follow the strike of the vein outside of his "side-lines. That would subvert the whole system sought to "be established by the law." If he locates crosswise of the lode and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. The end-lines of a location are those which are laid crosswise of the general course of the vein on the surface, and by those lines the locator's rights must be measured, no matter how he may have located his claim.

The question of parallelism of end-lines under the Act of 1866 was not a question before the Court in the Flagstaff case; nor does the Court in any manner pass upon it.

The case of *New Dunderberg Min. Co.* vs. *Old*, 79 Fed. 598, affirms the rule laid down in the Flagstaff case to the effect that when the side-lines of a location cross the course or strike of the vein they constitute end-lines, and the owner of the claim cannot follow the vein outside of those lines. Other questions were also raised and decided, but none of them have any bearing on the question of parallelism of end-lines under the Act of 1866.

The case of *Carson City Gold and Silver Min. Co.* vs. *North Star Min. Co.*, 83 Fed. 658, in many of its features resembles the case at bar; except that the end-lines of the North Star Mine converge, whereas the end-lines of the Pioneer Mine diverge in the direction of the dip of the vein. But the principle in both cases in my judgment is the same.

The application to enter and receive a patent for the North Star Mine was made on the 15th day of September, 1869, and the patent was issued on the 11th day of August, 1875. In the North Star case it was contended for the plaintiff in error that because the patented claim of defendant was composed of a number of locations, no extralateral rights were secured to it unless it showed the lines of each separate location. That Section 2322 Rev. Stat. U. S. refers exclusively to a single location. That if the boundaries comprising the aggregate amount applied for and patented do not appear in the patent, but only the exterior boundaries of the entire aggregated tract, then the patentee, if he claims the extralateral right as to any vein, the apex of which is found within the surface of his aggregate tract, should be held to establish by proof where some location was, and how it was laid upon the ground, or be denied the extralateral right.

The Court held that this contention could not be sustained. "That the defendant was not required to show the separate "lines of any of the original locations embraced within the "surface boundaries of the patented claim." It was enough for it to show that a lode running in an easterly and westerly direction (lengthwise with the claim) and having its apex within the surface boundaries of the defendant's patented ground, extended in its dip downward into plaintiff's ground.

The Court then discusses the rights conveyed by a patent and the presumptions in favor of patents regularly issued, citing authorities to the effect that the issuance of the patent is conclusive as to all precedent acts and facts which the Land Department must find to exist before the patent can rightfully issue.

As to the end-lines of the North Star Claim not being parallel, the Court, speaking through Judge Hawley, said:

"The plaintiff in error contends that if the patented "area of the North Star is to be considered as a location " its end-lines are not parallel, as found by the Court, and " that under Section 2310 Rev. Stat. the defendant pos- " sesses no extralateral rights under it. The Act of 1866, " under the provisions of which the patent in this case " was applied for, and under which rights of defendant " in error accrued, did not require parallelism of end- " lines."

From the foregoing it follows that the plaintiff possesses extral eral rights, and is entitled under its patent to follow the Pio er vein on its dip beyond the vertical plane drawn through the eastern side-line of the Pioneer Mine.

As to the question of interest, my opinion is that under Section 3287 of the Civil Code the plaintiff is only entitled to recover interest from the date of the stipulation.

I have examined the numerous cases cited with care, and after a most careful consideration of this case my conclusion is that plaintiff, the Argonaut Mining Company, is the owner of the ore bodies in dispute and that it is entitled to judgment. And it will be so ordered.

Dated March 13, 1889.

G. W. NICOL,
Judge Presiding.

[Endorsed]: Filed March 15, 1889, by J. S. Jack, Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

Nos. 49 and 58.

THE KENNEDY MINING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

ORAL ARGUMENT OF MR. CURTIS H. LINDLEY FOR DEFENDANT IN ERROR.

(18,060 & 18,080.)

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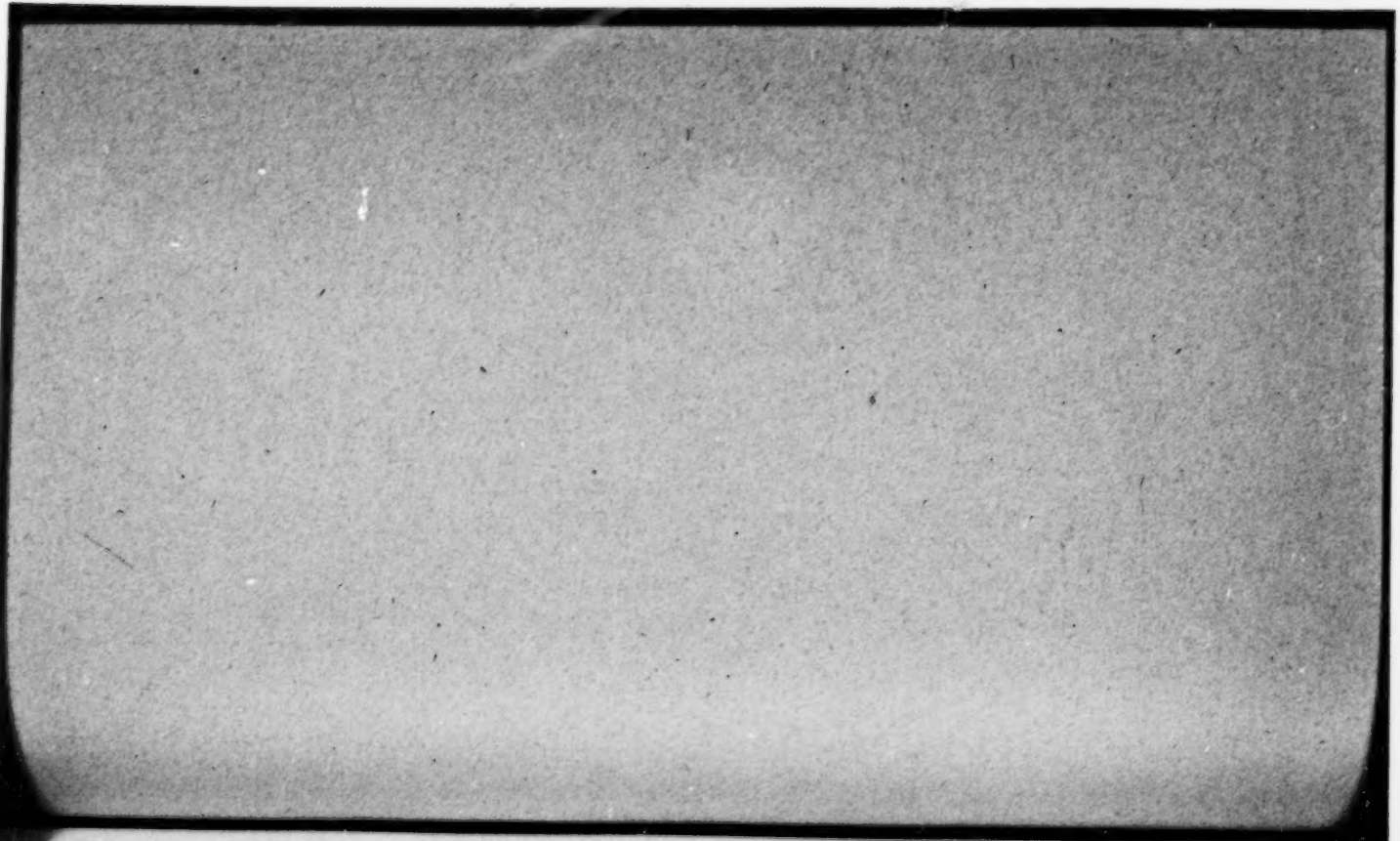

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Argument of Mr. Curtis H. Lindley for Defendant in Error.

Mr. LINDLEY: If your honors please, before taking up the merits of the controversy, with your permission I will address myself to the jurisdictional question.

We have here presented a controversy between two claimants, one asserting an extralateral right on a lode to follow the vein upon its downward course underneath the surface of an adjoining claim; the other, the owner of such adjoining claim, defendant in error, as the owner of the Pioneer, maintains that the lode has its origin within the Pioneer

ground and on its downward course passes underneath the Silva, the property of plaintiff in error. The priorities are by twenty years in favor of the Pioneer. The Pioneer contains the top or apex of the vein. The Silva does not. The point from which the ore in controversy was extracted was vertically underneath the surface of the Silva claim.

The action was trespass to recover damages for the ore extracted from the Pioneer vein underneath the surface of the Silva. Title to the Pioneer was set up in the complaint; ownership of the surface by the Pioneer was admitted by the pleadings, but our right to follow the vein in its downward course was denied.

No claim was set up in the answer to the ownership of the ore bodies in dispute. It was a simple denial of the underground rights of the Pioneer.

Now, let us see the manner in which this so-called Federal question was raised in the court below. Let us apply a method of common factoring and sift it down to the crucial question in the case. The manner in which counsel for plaintiff in error raised this question is found in the record. Please bear in mind the fact that the patent of the Silva contains a reservation, which is in the following language:

Mr. Justice PECKHAM: Where do you read from?

Mr. LINDLEY: I am about to read from page 6 of my brief on motion to dismiss or affirm. The Silva patent is found on page 31 of the printed record, and the clause to which I have reference is found on page 33 of the printed record. The language of that reservation is as follows:

"First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of

any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge."

It should also be borne in mind that under the act of 1872, as well as under the act of 1866, locations were made upon the outcrop of what the act of 1872 calls the top or apex of the vein. The Silva quartz mine, with its location in its present form, could not acquire any right on the Pioneer vein, because it did not have within its exterior boundaries the top or apex of the vein. The discovery on the dip of the vein, as was held by this court in Upton *v.* Larkin, would not have been a valid discovery. The law contemplates location by discovery of apex within the exterior boundaries of the claim.

That being the situation as to the facts, let us see the manner in which the Federal question is raised, and the construction of the act of Congress that counsel contends for to sustain his rights to this lode, which construction is controverted. In order to raise a Federal question, as I understand, the rule of this court is that there must be some *controverted* construction calculated to deprive a party of a substantial right guaranteed or granted to him by an act of Congress. Now, the Federal question was raised by the plaintiff in error at the end of a series of twenty-three objections to the admission of testimony, and it was raised in this manner——

Mr. Justice PECKHAM: Suppose you refer to that portion of the record.

Mr. LINDLEY: Yes, I will. It is page 54 of the record:

"And this defendant specially sets up and claims that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by the plaintiff to the ores in question by reason of its ownership of the Pioneer quartz mine, lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva quartz mine, lot No. 86, is involved, first, the construction of the act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under the provisions of which plaintiff acquired its title to said lot No. 48, and, second, the construction of chapter 6 of title 32 of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said lot No. 86."

No indication upon the face of the statement as to what construction is contended for, or as to what controversy there was over the construction. In fact there was no controversy over the construction of the act. It is not by reason of anything within the Silva patent or anything that purports to be conveyed by the Silva patent by which the plaintiff in error is deprived of something by any construction of the act of 1872. It is simply an inquiry as to the extent of the thing conveyed, and in order to determine what is within the reservation you are compelled to go entirely outside of the Silva patent, and when you do that you certainly go beyond the Federal question that is asserted or suggested with reference to the patent itself.

Mr. Justice McKenna: Where do you contend we go to?

Mr. Lindley: You go to a lode having its apex outside,

and determine whether it passes under the surface. It raises a mixed question of law and fact, and I shall quote authorities in a few moments.

The mere assertion of a right to property under any of the public land laws does not necessarily involve the construction of an act of Congress. If such were the case, as has been said by this court in Rutter *v.* Shoshone Mining Co. (177 U. S., 505, 507), every action to establish title to real estate in the newer States would involve a Federal question, because the title arises out of a patent issued by the Government pursuant to acts of Congress. In that case, I may remark, all these questions with reference to the "Federal question" involved in the pursuit of extralateral rights were reviewed by this court.

Now, so much for the manner in which the question was raised in the court below. I confess I cannot see how, by the mere assertion of objections to the court considering pieces of evidence, the attention of the court is called to the fact that there is any Federal question in the case. The mere asseveration and the repetition of that asseveration of a claim that the solution of the problems involved depends upon the construction of an act of Congress are not sufficient, in my judgment, to indicate a Federal question to the court. Perhaps if, upon the face of the record, the Federal question was apparent, the court might possibly dispense with the necessity of a specification.

Mr. WRIGHT: If it does not interrupt Judge Lindley, may I ask a question?

Mr. LINDLEY: Certainly.

Mr. WRIGHT: Was not the precise question in the Elgin

case raised by an objection to the construction of the patent to the Gilt Edge mine as a piece of evidence showing title?

Mr. LINDLEY: I must say I do not know; but if it was the Supreme Court did not express itself upon that question in the Elgin case. It did not express itself upon the Federal question in any of the cases counsel cited. But I shall point out cases where this court has specifically determined its want of jurisdiction in cases of this character. I have a list of three or four cases, one of which I claim is absolutely in point, where the question between the parties was similar.

The case I refer to is one where a senior locator owning the surface of a claim situated similarly to the Silva in the case at bar disputed the right of the junior locator, having the apex of the vein, to go underneath the senior location. The question was subsequently decided by this court in the [illegible] Monte case, and that question appeared upon the face of the record. The writ of error in the cause referred to was dismissed without specifying precisely the proposition in the opinion as to the lack of Federal question, but in a subsequent case this court construed the opinion in the case referred to, and I will, with the permission of the court, call attention to that case—the first case I have reference to—and I will state that these cases are not cited on my brief on motion to dismiss or affirm.

By agreement of counsel, I will state to the court, our oral arguments here are being taken down stenographically and we shall, at the close of the arguments, ask the privilege of the court, each one on his own behalf, to file the printed oral argument.

Mr. Chief Justice FULLER: Certainly.

Mr. LINDLEY: And this will contain all the authorities

which I now cite, and will be at the disposal of the court as soon as we can have the arguments printed.

Now, in this case of the Colorado Central Cons. Mining Company *v.* Turck (150 U. S., 138) the decision is by Mr. Chief Justice Fuller. The statement of facts is found preceding the opinion of the court, and set up substantially the same thing that the Pioneer sets up in this case. There was also a question of diversity of citizenship, but that is entirely irrelevant to the question under consideration here, and so I shall simply read those parts of the statement of the case which show parallelism between the case now under consideration and the case decided in 150 U. S., 138:

"Second. Plaintiff further alleges that upon the first day of January, A. D. 1885, he was the owner of seized in fee and entitled to the possession of a certain lode mining claim and premises, situate in Argentine mining district, Clear Creek county, Colorado, described as follows, to wit: The Aliunde Tunnel lode, No. 2, with all the dips, spurs, angles and variations of said lode throughout their entire length and depth and all other lodes, veins, ledges or deposits of mineral, the top or apex of which lie inside of said Aliunde Tunnel lode, No. 2, as patented to John Turck by certain letters patent of the United States, dated the 31st day of January, A. D. 1883, which lode, mining claim and premises are described in said patent as mineral entry No. 1862 in the series of the United States land office at Central City, Colorado, and designated by the surveyor general of the State of Colorado as survey lot No. 1494, which lode is 1,500 feet in length by 150 feet in width.

"Third. That said Aliunde lode No. 2 has a pitch to the northwest of about sixty degrees from a horizontal; that the top and apex of said lode lies within the side and end lines of said Aliunde Tunnel lode No. 2; that owing to the dip of said lode to the northwest, at a depth of about 300 feet be-

neath the surface of the ground, said Aliunde Tunnel lode No. 2 passes under the north side line of said patent and enters the land adjoining; that while plaintiff was so seized and possessed of said Aliunde Tunnel lode No. 2" ——

Then follows a description of the *locus* of the trespass and the ground from which the complainant was ousted. This was out from underneath the surface, just as the ore bodies are out from underneath the surface of the Pioneer.

"That plaintiff owned the property in fee, and was entitled to possession, and that the value of the rents, issues, and profits 'while said plaintiff has been excluded therefrom by the defendants, amounts to $250,000;' wherefore judgment was demanded for possession, damages, and costs."

The defendant answered by general and special denial, and asserted title to the lode mining claim under which or beneath which it was claimed by plaintiff this vein dipped, presenting, as I understand, a precisely parallel case to the one under consideration, with the exception that the question there was whether a location not having the apex of the vein, but being senior in point of time to the location having it, could be invaded by the junior apex proprietor—a much stronger case, I think, for illustration than the one at bar. The court, in its decision in the Colorado Central Consolidated Mining Company *v.* Turck, said:

"The jurisdiction of the circuit court was invoked December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground. The Federal question now suggested did not emerge until the defendant set

up its second defense, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication.

"The proposition that the right given by sec. 2322 of the Revised Statutes to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right against an adjoining claimant holding under a junior patent or certificate was afterwards advanced in certain instructions requested by defendant and refused.

"The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

"If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented.

"We are of opinion that the judgment of the circuit court of appeals was final under the 6th section, and that the writ of error cannot be maintained."

In the subsequent case of Blackburn *v.* Portland Gold Mining Company, 175 U. S., 571, where the opinion commences, but I shall read from page 584, where this case of Colorado Central *v.* Turck was discussed by this court:

"Colorado Central Consolidated Mining Company *v.* Turck (150 U. S., 138) was brought to this court on a writ of error to the circuit court of appeals from the 8th circuit. An action of ejectment by Turck against the mining company for possession of a certain lode mining claim had been tried in the circuit court of the United States for the district of Colorado, and determined in the plaintiff's favor. The case was taken by writ of error to the U. S. circuit court of appeals for the 8th circuit, and the judgment was there affirmed, and thereupon a writ of error was allowed to this court. The

case was here heard on a motion to dismiss on the ground that the suit was between citizens of different States, and that, therefore, under the judiciary act of March 3, 1891, the judgment of the circuit court of appeals was final. An attempt was made in argument to sustain the right of this court to take jurisdiction, because, although the suit was between citizens of different States, yet that the solution of the dispute of ownership depended upon the construction and application of sec. 2322 of the Revised Statutes, concerning the dip and apex of lodes, and that hence the suit really and substantially involved a controversy only to be determined by reference to the Federal statute. But this contention did not prevail, and the writ of error was dismissed.

"While it is true that the conclusion reached was mainly put upon the ground that the record did not disclose affirmatively that any distinctive Federal question was involved, yet, as the record did disclose a controversy between claimants arising under a Federal mining statute, it is a necessary implication of the decision that that fact alone did not render the case one of which the circuit court could take jurisdiction irrespective of citizenship, but that other and apt allegations were required showing that the controversy was determinable by one of two conflicting constructions of the Federal statute, and not one of mere fact in which the validity of the statute was not drawn into question."

Mr. Justice WHITE: Does not this case come up on one of two conflicting constructions of statutes, if your lode should be construed as limited by the act of 1872 and the act of 1872 should be so construed?

Mr. LINDLEY: In response to that suggestion, I will say yes, but that is an infirmity of our patent, not of the Silva.

Mr. Justice WHITE: I am not speaking of that other question, but of the authority you cite as conclusive in this case. That authority held that the mere fact that there was a con-

troversy about a mining patent did not alone cause a Federal question to be presented.

Mr. Justice McKenna: More than that, did it not present a case which prevented the judgment of the circuit court of appeals from being final and not reviewable here?

Mr. Lindley: Under the judiciary act.

Mr. Justice McKenna: The judiciary act of March 3, 1891.

Mr. Lindley: I cannot understand the opinion upon any other theory. What was the court talking about in Blackburn *v.* Portland Gold Mining Co. except a Federal question?

In response to the question by Mr. Justice White, I will say that there is no opportunity in this case for a controverted construction of the various statutes. We say that under the act of 1872, in order to obtain an extralateral right, the end lines must be parallel. There is no controverted construction. The test of the investigation is whether the facts outside the Silva patent bring us within the terms of the act of 1872, and bring us within the restrictions of the act of 1872. Our rights are predicated upon the act of 1866, and that act was not referred to as raising a Federal question in the objection specified in the record.

Mr. Justice White: The objection does not specify any act.

Mr. Lindley: Yes; it specifies the act of May 10, 1872, and the Revised Statutes.

Mr. Garber: May I interrupt you?

Mr. Lindley: No objection.

Mr. Garber: It practically says that under no statute of the United States did they have that right.

Mr. LINDLEY: I do not see any such language in your Federal question.

Mr. GARBER: It is there.

Mr. LINDLEY: Well, Judge, be kind enough to point that out to the court. I do not see it here.

Mr. GARBER: I will find it for you.

Mr. LINDLEY: The controversy here is not over the proper construction of the act of 1872. It is over the rights that accrued, as we claim, under the act of 1866.

Mr. Justice PECKHAM: There ought to be a question of construction. That is what you speak of. What are the facts in dispute?

Mr. LINDLEY: There are no facts in dispute. They are all conceded and admitted. There are no facts except a physical existence of the lode itself having the apex outside the Silva patent.

Mr. Justice MCKENNA: Does not the application of the rights of the parties depend upon the construction of the acts of 1866 and 1872? Does not the opinion of the Supreme Court from beginning to end construe both acts?

Mr. LINDLEY: Very true; but, from the standpoint of the supreme court of California, it was dealing with what it called the common-law rights of the Silva, which arose from the presumption flowing from surface ownership. It certainly construed the two acts, but when we look for something in the record pointing out the Federal question to the trial court we do not find any mention of the act of 1866. It is not mentioned in this record.

Mr. GARBER: Let me read this from page 23 of the brief of the plaintiff in error:

"All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48."

Mr. LINDLEY: Well, that does not meet the objection.

Mr. GARBER: That sustains my statement.

Mr. Justice MCKENNA: That appears on page 95 of the record.

Mr. LINDLEY: That appears in Judge Garber's brief, and I suppose it is in his objections.

Mr. Chief Justice FULLER: In the objections and exceptions?

Mr. LINDLEY: This case of Blackburn *v.* Portland Gold Mining Company was the first case that determined that an action on an adverse claim was not an action that arose under the laws of Congress so as to give the Federal courts jurisdiction.

Mr. WRIGHT: May I interrupt you a moment? We set forth on page 95 of the record the quotation read by Judge Garber. It may also be on page 65, but it is on page 95.

Mr. LINDLEY: In the Blackburn-Portland case the court reviews a great many of its antecedent decisions, and reaches the conclusion, as I have stated, that no Federal question was necessarily involved, because the controversy was as to the different rights under mining claims. I do not cite that case as being precisely in point, but I cite it because it contains a review of the decisions of this court upon kindred subjects.

The question as to what constitutes a Federal question and how far mere ownership of real estate acquired from the Government, where a right is attacked, involves a Federal question was suggested and discussed in the case of Gillis *v.* Stinchfield (159 U. S., 658), an action instituted in California concerning a mining claim, which was brought here on a writ of error to the supreme court of California to review a judgment of that court against the defendants for the value of certain gold taken by the defendants from the mining claim of the plaintiff. It was contended that the record showed that a Federal question arose in the case which could only be determined by an application of sections 2322 and 2336 of the Revised Statutes. The opinion says:

"The decision of the Supreme Court was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad enough to maintain the judgment."

I think that case is authoritative in respect of titles derived under the mining laws of the United States that such titles may be legitimately determined by the State courts, but that to enable this court to review a judgment in such a case it must appear that there was a construction of an act of Congress adverse to the contention of one of the parties.

The test, I take it, with reference to these questions arising under grants is stated perhaps in a better way by this court in Rutter *v.* Shoshone Mining Company, in 177 U. S., which was a case reviewing the Blackburn-Portland case,

the opinion having been written by Mr. Justice Brewer. This court said, at page 505:

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses; for if it did, every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws."

Now, I will cite these cases in my argument, so that they may be printed. I also cite the case of Bushnell *v.* Crooke Mining and Smelting Co., 148 U. S., 682. The Blackburn-Portland case is 175 U. S., 571. I am addressing myself to what, to my mind, appeared to be proper analogies in the discussion of this question. There is another quotation which seems to me to be quite apt on that subject, but I will look it up at recess, with the permission of the court.

Now, the fact is that if the Silva Mine, the plaintiff in error here, owns the ore bodies in dispute, it does not own them by virtue of any specific grant other than the presumption flowing from the ownership of the surface, because the law contemplates the exclusive right of possession to the surface, together with all veins that have their tops or apices therein; and the only manner in which the owner can claim title to these ore bodies is by the presumption flowing from surface ownership, which is essentially a common-law presumption, and has nothing to do with Federal statutes, any more than if it were a case of an agricultural patent, a town lot under the town-site law, or a pre-emption or homestead claim. If an agricultural

patent were junior in time, and where title to agricultural land would carry the same presumption that followed the title to the surface of a mining claim, how could an agricultural claimant assert a Federal question, so far as his agricultural patent is concerned, when the infirmities were not in his patent, but somewhere else?

Mr. Justice WHITE: Suppose this case, which I tried to point out yesterday: Suppose an agricultural patent issued to a man for 640 acres of land; suppose that somebody comes along and undertakes to claim and take out stone or coal or something under the surface; suppose the man sets up his patent and says, "I acquired this land from the United States, and the fact of the acquisition by me of that land from the United States and my rights under that patent were to give me the right to that coal, and you cannot take it away from me." Then suppose the court should hold that the other man could take it away from him, because by another act of Congress some man had a right to come in and take that coal in defiance of the first patent. Would you not say that that presented a Federal question, and that the denial of that man's rights could be reviewed here?

Mr. LINDLEY: It would depend very largely upon whether the grant purported to convey the coal. If it did, and there were reservation of title to the coal, it would not be necessary to construe any act of Congress.

Mr. Justice WHITE: You say there would be no Federal question to decide, if you decide; but how can you decide if there be no power to decide?

Mr. LINDLEY: If that be the correct answer to the problem, there is no patent to Government land where the right

to coal under it is taken away, but what involves a Federal question. If you cut timber from a claim, or invade an agricultural patent in any shape or form, and the court holds that somebody else is entitled to it and takes it away from your patentee, it necessarily involves a Federal question, because you have to look at the act of Congress under which the patent was issued.

I am admonished that my time is pressing, so I shall now have to take up the merits of the case, leaving the discussion of this subject for the present at least. I ask the indulgence of the court to deal with the merits of the case in rather an elementary way, or what we might call an evolutionary way.

The rights of the parties here have arisen, perhaps, in a period antedating the passage of any law of Congress with reference to the appropriation of mining claims.

Our conception of the thing in controversy here is a vein or lode, a body of mineralized rock lying in the mass of the mountain, usually embraced within defined walls, and occupying a more or less inclined position in the mass of the mountain. In other words, it is a distinct entity from the surrounding mass, and subject to severance by the paramount proprietor, and descends into the earth usually at some considerable angle from the horizontal or from the perpendicular.

In the beginning there was no law. The Government of the United States had passed no laws controlling the disposition of mining lands in the West, and so the miners started out to make a law unto themselves with regard to the acquisition, operation, and development of the mineral regions of the extreme West. I speak of the extreme West because

it was in California where the first discovery of gold took place, where the local rules and customs originated, and where the subsequent act of 1866, that being the first legislation of Congress upon the subject, was a crystallization of those local rules and customs. It was held by this court in Jennison *v.* Kirk and Broder *v.* Natoma Water Company and in a long line of decisions that the Government found that a system of laws had grown up in these mining camps of the West, and that large interests had become practically vested without the consent of the Government. But the Government, in its wisdom, saw fit to recognize those customs, and ultimately the rights existing by reason of these local rules and customs ripened into a higher degree of title. The Government recognized and crystallized these local rules and customs in this first congressional law.

Now let us see what the rights of the miner were on a lode when he first discovered it. These lodes, of course, do not outcrop ideally. It is very rare that there is an outcrop for any continuous length. The first act which gave him a possessory right, either under local customs or the later and higher law, was the discovery of the vein. When he discovered that vein he was entitled by the local rules of the vicinage to so many linear feet.

Mr. Justice PECKHAM: How many?

Mr. LINDLEY: It varied in different mining camps of the West. In many cases it was 200 feet on the vein, with 200 additional feet for discovery. That made 400 feet that a single locator might take. As evidence of what the miner had appropriated in linear length, he had to post a notice upon his discovery, and the extent of that notice was simply, "I hereby claim two hundred feet upon this vein (naming

it), together with two hundred additional feet by right of discovery." That was all that was done. There was no limiting the boundaries, no defining by surface lines enclosing the vein; and up to the time he applied for patent under the act of 1866 and enclosed that vein within certain definite boundaries, he had a right to follow it upon its course in any direction in which it might run.

The miners' law, as well as the law of 1866, was practically a law of one dimension. The miners' rights were measured by a rope. That was also the rudimentary instrument of miners' justice.

In addition to his number of linear feet upon the vein, he was entitled to what was called, in the vernacular of mining camps, all the dips, spurs, angles, and variations; and sometimes the vocabulary was expanded in an endeavor practically to get everything in width that he had not in length. Any reference to the surface was in connection with the lode; it was not for the purpose of defining rights on the lode, it was for the purpose of convenient operation of the lode. For instance, if he adopted some primitive method of dealing with his quartz as he extracted it he would be permitted, under the local rules and customs, or, in the absence of those rules and customs, to select a certain quantity of surface that would enable him economically to handle the ore. Sometimes it expanded into a reasonable amount and sometimes the local rules allowed him more than was reasonable. The only limitation to this quantity of surface was, in one locality, measured by the exigencies of the miner. In another it was fixed, sometimes bounding the vein on each side or at the end of the vein. So that when the act of 1866 was passed it adopted those local customs which

affirmed all the rights that had theretofore been acquired and perpetuated that same system.

Mr. Justice WHITE: May I interrupt you?

Mr. LINDLEY: Yes, sir.

Mr. Justice WHITE: Under the local customs—although this has nothing to do with this case—as I understand you, upon taking up that four hundred feet on the lode he was entitled to follow the dip of the vein, no matter how far it extended?

Mr. LINDLEY: Yes, sir; just as far as it would go; he might go through to China if he could.

Mr. GARBER: I do not think counsel understands the question.

Mr. Justice WHITE: I mean in its downward course or dip.

Mr. LINDLEY: We say all dips, spurs, angles, and variations. The spurs refer to the little subsidiary offshoots, but which form perhaps physically a part and parcel of the vein.

Mr. Justice WHITE: The miners' customs then had no limitations by vertical lines?

Mr. LINDLEY: No, sir; they had none, except as to length. There were no end-line planes there, and it was a great many years before it became necessary to establish anything of the kind, because the appliances for mining were primitive, and it was impossible to work at any great depth, and the remoteness of those camps from centers of civilization prevented the importation of machinery until later years.

Now, a lode has no more regularity in its course than it has in its depth. It does not necessarily pursue a straight line, even on a level, owing to the topography of the country

and the fortuitous nature of the exposures, and also, instead of following an ideal straight line, they would form in a circle or semicircle; it was more often in that shape than in a straight line. The first man came along and took up a claim. The next came along and tacked on to him; and so, by the time three thousand feet (which was the amount allowed under the act of 1866 by an association of persons) was reached, the extremities of the vein, if a straight line were drawn between them, would form the segment of a circle. Each miner having so many feet upon the vein, it was impossible, in my conception of the law, and the only conception, I think, is what Mr. Justice Field said in that great classic, the Eureka case, because we take our historical knowledge of the evolution of this law from the books of the tribunals wherein are fixed rights in controversy, and which have recognized and administered the local laws. So there was no conception, in the miners' laws, of an end line. Each miner had so many feet on the vein.

Mr. GARBER: What did Judge Field say about that Eureka case?

Mr. LINDLEY: He said end lines were implied; but what Judge Field meant by that, very clearly, was that he could not go beyond his linear measurement on the strike or course of the vein. That is all that was meant, as we shall see. Whenever the miner undertook to inclose that vein within a surface, that, by interpretation of the courts at least, marked the limits beyond which he could not go on the course of that vein. For instance, if he claimed, as in the Flagstaff case, 2,600 feet, and made the location so that he included only 100 feet, he only obtained the one hundred feet. His error arose in marking the

location at all. But if he did mark it, he was bound by it, because that was notice to the next comer. So it is very easy to conceive that what we might call the end lines of these claims were every which way. Take the lode upon which this claim is located. The mother lode traverses nearly one hundred miles, from Mariposa county clear over into El Dorado county, and there are locations all along that line of lode, farms and homes, of course, intervening where the lode had not been discovered at the surface; but you find a man located on one part of that lode and another on another part; then subsequently the different claimants working together. But there are changes in the course of the vein and irregularities in the surface form, even when they mark their boundaries. Here is a case of diverging end lines. The North Star case was a case of converging end lines. The Central Eureka, now before the supreme court of California, was one of those vacant spaces between the two boundaries the end lines of which were not parallel. The miner took what was left, regardless of mere form of surface.

With your honors' permission, I would like to read what this court has said about this very condition of affairs we are leading up to in connection with the discussion of the extralateral rights allowed the Pioneer, or the Argonaut, as they call it. I am simply making a statement to show the processes of evolution, how the Pioneer emerged from its primitive condition to a patent issued by the Government of the United States, and what was the intent and spirit of the law under which its rights accrued. The main object of the miner was the lode; the surface was a mere incident.

As this court said, speaking through Mr. Justice Brewer, in the Del Monte case (171 U.S., 55, 64):

"The purpose herein manifested was the conveyance of the vein, and not the conveyance of the certain area of land within which was the vein. * * * Nowhere was there any express limitation as to the amount of land to be conveyed. * * * Obviously the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area, or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface 'as was fixed by local rules,' or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine.

"As might be expected, the patents issued under this statute describe surface areas very different, and sometimes irregular in form. Often they were like a broom"——

That was the case of the famous Idaho mine, in California, the patent to which described the shape of a broom. That was the shape referred to by Mr. Justice Brewer in his opinion. That was one of the early patents issued under the act of 1866, and showed the conception of the Land Department at that time as to the manner in which these claims should be patented. Now, says this court, continuing:

"Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight, or in a curved irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable

size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules, giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area."

Mr. Justice Field, in speaking for himself and the three judges sitting on circuit in California and Nevada (sitting with Judge Hillyer and Judge Sawyer), presiding at the trial of this famous Eureka case, to which I shall invite your attention shortly, in summing up this situation, said:

"If it is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode, is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course or to follow the dips, angles and variations of the vein, or control the direction he shall take."

If the locator did describe this surface area, including the vein, he could not have but that one. The other one, subject to certain limitations as to entry upon his ground, was subject to location by some one else. What my distinguished adversary calls ancillary lodes are not an every-day occurrence. They are rather rare in the gold regions of California, where the miners' rules and customs had their inception. We do encounter them sporadically in the administration of the mining laws, and that invites attention to the fact that such things were contemplated when the act of 1872 was passed. But the possession of those ancillary lodes has been magnified to a very large degree by the exigencies of the counsel's case.

Mr. GARBER: I stated it just as I have experienced it.

Mr. LINDLEY: Perhaps our experiences have been different. The Comstock lode was the earliest experience I ever had. It was wide enough to take in pretty near all creation; but there was no ancillary lode, according to the testimony of every one. We concede, of course, and the act of 1872 recognizes, the possibility of the existence or the fact that these secondary lodes or ancillary lodes exist. We sometimes call them subsidiary, because there is a principal lode, which a man discovers and locates, and these others are those that fall to him by fortuitous incidents, which he could not have foreseen. So I distinguish between the original lode, as was the Pioneer in this case, and such other lodes as might possibly be in the ground. But there are no other lodes in controversy in this case. The whole controversy in this case is over the original lode, the one located under the act of 1866, and the one passed to entry before the act of 1872 was passed. The record here shows that the controversy here is over the original lode patented to the Kennedy and the Argonaut, respectively.

Now, I wish to invite the attention of the court to a suggestion or question of Mr. Justice Peckham yesterday as to how there come to be converging lines in the construction of these rectangular end-line planes on the main vein, the top or apex of which traversed the Pioneer and also the Kennedy quartz mine, which is likewise owned by the plaintiff in error. There was a controversy between the Pioneer and the Kennedy as to the position of their common boundary and to the rights of the two parties on this vein.

Mr. GARBER: Not these two parties.

Mr. LINDLEY: You call yourselves the Kennedy Milling

and Mining Company. I am not stating this for the purpose of doing anything more than answering the question that Mr. Justice Peckham asked.

There is a compromise agreement in the record. The trial court ignored that because it did not think it was necessary to be considered, I suppose; but there is a compromise agreement that the surveyor should draw the common boundary on the lode between them at right angles to the strike of the vein at the point where the common boundary now exists. In defining this rectangular line the surveyor gave the Pioneer a little bit the worst of it. In other words, the line A^2 (on map Exhibit A) would be strictly the rectangular line; but that is to the north of the extended, or what we may call, for the purpose of designation, the compromise line. We are not now insisting upon this compromise agreement, except by way of estoppel, which is referred to in the latter part of my brief, and which I shall reach in due course. Neither the supreme court of California nor the trial courts gave any weight to that compromise agreement, but we are explaining that we are short and have slightly converging lines when you apply the rectangular planes to the strike at points of the vein within the surface area by reason of the compromise.

Mr. GARBER: That compromise agreement was excluded when offered in evidence.

Mr. LINDLEY: We all agreed upon the facts. Then each party reserved the right to object to the consideration by the court of any particular fact or series of facts.

Mr. GARBER: I beg your pardon. We agreed upon the facts, subject to all objections as to admissibility.

Mr. LINDLEY: Is not that the equivalent of what I say?

Mr. GARBER: I think not.

Mr. LINDLEY: Well, I accept your amendment.

Mr. Justice BREWER: Did the Kennedy mine own that other location?

Mr. LINDLEY: Yes, sir. The Kennedy Company, the present plaintiff in error, started a shaft in front of the apex, first a vertical shaft, and ran it until it reached the vein, and then followed the vein in its downward course. The Kennedy started its shaft, and then crossed over the common boundary line between the Kennedy and the Argonaut or Pioneer, and commenced to extract ore from the south of the common boundary, and that started this suit. They then defended under the surface ownership of the Silva. That claim was located twenty years after the discovery and location of both the Pioneer and the Kennedy, the Silva quartz mine being presumptively—absolutely, conclusively—possessed of the apex of another vein away to the east of the Pioneer and Kennedy mine. That started the suit. The first intimation that we probably had of the assertion of the rights of the Kennedy Company to the Silva was at the time the suit was started.

Now, I have explained to the court how these inequalities might very readily occur in making these linear locations. Here we find (pointing to the map)—perhaps looking for an excuse—a reason why there should not be a parallelism, if such a conception was in the mind of the locator, the survey having been made before there was any law requiring the vein to be enclosed. We find that the south line was coincident with the quarter-section line.

Mr. GARBER: Did not the law of 1866 require the vein to be enclosed?

Mr. LINDLEY: No.

Mr. GARBER: Was not that the decision in the Flagstaff case?

Mr. LINDLEY: No, sir; I have just read the language of this court, which said that sometimes the location was in the shape of a broom.

Mr. GARBER: Did not Justice Brewer in that decision state——

Mr. Chief Justice FULLER: I think we had better proceed without interruption.

Mr. LINDLEY: What Justice Brewer said I read from his decision. If we are wrong, of course I would like to have the court correct me.

While on that subject, if your honors please, I will give an illustration of what counsel possibly refers to. In the case of New Dunderberg *v.* Old, one of the cases cited by counsel, there is an illustration of how the miner lost his vein by making his location so as to include it within surface boundaries. I shall have occasion to refer to this case again, because it is cited by counsel as if it were an accepted patent under the act of 1872 and stands under that act. These locations were in Colorado, where the limit of width was fixed at fifty feet. The Dunderberg claim is a long one, being three thousand feet, allowed by the act of 1866. The discovery point is indicated where I now rest my pointer. He claimed three thousand feet upon the vein, and ran his lines so that they might cover the vein to the extent claimed. But he mistook the course of the vein, for it ran diagonally across his claim and entered the Frostberg location. The court very properly held that his right to follow

that vein on its course stopped where the vein, on its linear course—what we call, technically, the strike—passed out of his claim. That was precisely the situation in the Flagstaff case, where the locator undertook to define the boundary, calling for 2,600 feet. The patent for Dunderberg having been applied for and issued under the act of 1872, although the location had been made under the act of 1866, the court says that the Dunderberg owners did not lose the vein because the act of 1866 was repealed, but lost it because they undertook to define their boundaries and mistook the course of the vein. I will refer counsel to the precise language of the decision. Here is what the court says in regard to that:

"But it was not the repeal of these sections of the act of 1866 that affected the rights of the owner of the Dunderberg lode. That repeal did not deprive him of any right he had to follow his lode into the Frostberg claim. It was his location, entry and patent of his claim, from which the lode departed on its strike 309 feet before it reached the Frostberg, that affected his rights."

79 Fed., 603.

That was taken out under the act of 1872. I shall have occasion to refer to that case again in a few moments.

Now, on the subject of end lines under the act of 1866, we have an abundance of authority to the effect that under that act end lines were not required to be parallel. It was not a mere sporadic remark by the court incidental to the investigation of the case, but it has been solemnly stated by this court in a great many cases, comparing the language of the act of 1872 and the act of 1866. We have excerpts from the decisions of some seven or eight cases in different courts in the mining regions of the West, as well as this court.

For instance, Mr. Justice Field, in the Eureka case (4 Sawyer, 302), says:

"In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866, where such parallelism in the end lines of the surface locations were not required."

That case was affirmed by this court in Richmond *v.* Eureka (103 U. S., 89).

Mr. Justice Field, in the Iron Silver Mining Company *v.* Elgin Company (118 U. S., 196), speaking for this court, says:

"Under the act of 1866, parallelism in the end lines of a surface location was not required."

Again, we find the case of Walrath *v.* Champion Mining Company (63 Fed., 552), a case which came to this court, wherein it was said:

"Under the act of 1866 parallelism was not required."

Also, in the case of Carson City G. S. Mining Co. *v.* North Star Mining Co. (73 Fed., 597), to the same effect. There a patent had been obtained for some sixty acres of land, which patent was issued after the act of 1872 was passed, and enclosing a vein where the end lines converged in the direction of the depth. The courts in these cases were dealing with the rights of the parties arising out of those old locations. There are diagrams in these different cases showing the different situations of different properties in my printed brief, and they will show an apt illustration of the object of the court in using this particular language. In this par-

ticular case of Carson City Co. *v.* North Star, which, by the way, was referred to by this court in a later decision, it was said:

"The act of 1866, under which the rights of the defendant in error accrued, did not require parallelism of end lines."

The same doctrine was practically reiterated by this court in the case of Del Monte M. and M. Co. *v.* Last Chance M. Co. (171 U. S., 55, 67). Said the court:

"There is no inherent necessity that the end lines of a mining claim should be parallel. Yet the statute" (act of 1872) "has so specifically prescribed."

The court here took a recess from 2 o'clock to 2.30 p. m., after which Mr. Lindley continued his argument.

This being the underlying principle of the act of 1866, let us examine the proceeding under which was acquired the title to the Pioneer or Argonaut mine. The proceeding is somewhat similar under the existing law. It is actually so, so far as the legal effect of it is concerned. It is a proceeding *in rem*, so characterized by the courts, where the claimant was called upon to file a diagram, as the act expresses it, of his lode or vein so extended laterally—referring, of course, to such of the surface as was allowed by the local rules and customs—as will satisfy the rules and customs in vogue in the neighborhood. He was then required to post and publish a notice of his claim and of his intention to apply for a patent. By this process of posting and publication every one was summoned to appear and show cause why the patent should not issue in conformity with his

claim as shown on the diagram posted on the ground and in the local land office. There being no adverse claim to the lode or to the surface ground connected with it, as shown upon the diagram, the claimant was permitted to enter the vein and the surface ground as exhibited on the diagram, paying therefor to the Government $5 an acre in case of lode claims. This culminated in the issuance of a receiver's receipt or certificate of purchase, which, in the absence of any attempt on the part of the Land Department to correct it for errors or irregularities, has the effect of conveying what this court has denominated the complete equitable title.

The predecessors, in title, of the Argonaut Company had proceeded that far before the act of 1872 was passed. They had made the entry at the land office, paid the entry fee and purchase price, and received the certificate of purchase. Thus the situation stood when the act of 1872 was passed.

The act of 1872 was framed on altogether different theories. There the locator was called upon and required to inclose his lode within certain defined surface boundaries, the maximum of which was 300 feet on each side of the center of the vein. While the act of 1866 granted but the one lode, the act of 1872 purported to grant all the lodes other than the original one which might be found within the surface. That was the first time there was incorporated into any law the requisition for parallelism of end lines.

I have now reached a point where I think I can outline to this court in a succinct way the position that the defendant in error here takes regarding all the controverted questions, passing the one of jurisdiction, and this will enable us to define sharply the difference between the position of

counsel for plaintiff in error and that of counsel for defendant in error.

We contend:

I.

That prior to the passage of the act of May 10, 1872, and during the period embracing the discovery, location, application for patent, and the final entry in the land office of the Pioneer lode and the surface embracing it, the principal thing acquired by a lode locator was the vein. The surface was a mere incident, not controlling the rights of the locator so far as depth was concerned. In the language of the act of 1866 and according to the miners' vocabulary, he was entitled to the vein throughout the claimed length, with all its dips, spurs, angles, and variations.

II.

While the act of 1866 contemplated the existence of end lines of a lode location, in the sense that such boundaries marked the limit on the course of strike of the vein beyond which the miner might not go, such boundaries did not necessarily determine the direction to be given to vertical planes bounding underground rights. Each subsequent locator on a vein adjusted himself to the rights of the first comer, and the boundaries between them underground were regulated in the order of priority.

III.

The law of 1866, being a law of one dimension, the right of the locator in the vein was measured horizontally at the surface along the course of the vein, and vertically by planes

drawn through the vein at the extremities of the length claimed at the surface, and at right angles to the general course or strike of the vein, which course or strike was defined by connecting the two extreme terminals.

IV.

The locator was not called upon to enclose the vein at the surface within any defined boundaries. The form and extent of the surface claims was not fixed by the law, but was regulated either by local custom or by the selection of the miner, within reasonable limitations, of surface in such form as might be essential for use in connection with the lode.

If, however, the locator saw fit to define a surface area surrounding or purporting to embrace the length on the vein claimed by him, he was not permitted to pursue the vein on its course beyond those defined limits. Prior to so defining his surface limits he might pursue the vein on its course, in whatever direction it might run, for the length claimed. Perhaps this limitation on underground rights, where there was a definition of surface boundaries, was between planes drawn vertically through the lines of the location crossing the lode, at least so long as these lines were substantially at right angles to the general strike of the vein within the location. Were they greater, or divergent, so as to cause inequalities in depth, the rectangular limitation prevailed. If they were less, or convergent in the direction of the downward course, it is possible that he was limited to those convergent planes and could not go beyond them, and to the extent of the convergence the rectangular principle

yielded to the course of the converging end lines. We do not say that this was the correct rule, but we say that this is all that can be claimed, so far as the force of surface boundaries under the act of 1866 is concerned.

V.

If we assume, for the time being, that the Pioneer had passed to patent at the date of the entry, in February, 1872, prior to the passage of the act of May 10, 1872, there can be no question but that under the law of 1866 the owners of that claim would have been granted underground rights on the original vein, at least between vertical planes constructed at right angles to the course of the vein, at the north and south extremities of the vein within the location, as determined by the supreme court of California in the case at bar.

VI.

Prior to the passage of the act of 1872 the claimant of the Pioneer vein had applied for a patent for 1,589.96 feet of the Pioneer vein, and for the surface for its convenient working, as shown by the patent survey. He had, pursuant to the law of 1866, filed the diagram of his vein, so extended laterally as to embrace such surface as he claimed, either as necessary for convenient working or as allowed by local rules.

(The issue of a patent, as has been held by this court, is conclusive evidence that the amount of surface specified in the patent was such as was allowed by the local rules. I will comment shortly upon the Lakin *v.* Dolly case, but I understand that to be the principle—the amount of surface

specified in the patent was presumptively that allowed under the local rules, so far as the act of 1866 was concerned.)

Notice of the extent and nature of his claim was then given, pursuant to the statute, by publication and posting on his claim. There were no adverse claims, and in due course he entered the property at the land office, paid the Government the price, and received his certificate of purchase.

VII.

The issuance of this certificate of purchase, following the payment of the purchase price, vested in the claimant the complete equitable title. While the Land Department retained jurisdiction for the purpose of reviewing and testing the regularity of the proceedings culminating in the issuance of the certificate, this supervisory control was not an arbitrary one, and its exercise was limited to the correction of irregularities in the proceedings or substantial departure from the method prescribed by the law under which it was issued, or to vacating the entry should fraud be established. This reserved power could only be exercised upon notice to the purchaser, who had a right to be heard before his status as such purchaser could be altered to his detriment. No such supervisory power was exercised. The patent subsequently issued was based upon this entry, the integrity of which had not been questioned. This entry is recited in the patent and specifically found by the trial court.

It is familiar to all of us that before a patent issues there must be an entry. This patent recites that this entry was made in February, 1872. Consequently, there can be no

suggestion that there was any exercise of this reserved power by the Land Department for the correction of any irregularities. There were no irregularities, because the patent recited that the claim had passed to entry in February preceding the passage of the act.

Mr. Justice McKENNA: You claim that he complied with the requirements and received his patent strictly under the act of 1866?

Mr. LINDLEY: We did comply, and went to entry under the act of 1866.

Mr. Justice McKENNA: But the patent was taken out under the act of 1872; at least that is the contention on the other side.

Mr. LINDLEY: The patent did not issue immediately, because the magnitude of the business of the land office did not permit. It was issued, however, in the regular course of business.

Mr. Justice McKENNA: They say on the other side that it was issued under the act of 1872.

Mr. LINDLEY: But I say that it was issued under the acts of 1866, 1870, and 1872, because there were provisions in the act of 1872 preserving rights that had been acquired theretofore. The patent was issued under the act of 1866. It also recites that it was issued under the act of 1870, which was supplemental to the act of 1866, and also under the provisions of the act of 1872; that is to say, the authority for the issue of the patent at that time may be considered to be the act of 1872, which preserved rights as they had existed, and related back to the entry which was made in 1866, there having been no adverse claims.

Mr. Justice McKENNA: Do you claim anything additional by reason of the act of 1872?

Mr. LINDLEY: We do not.

Mr. Justice McKENNA: You simply claim under the act of 1866?

Mr. LINDLEY: We do not claim anything additional, with this exception—and I will reach that in a moment—with reference to the flaring lines.

Mr. Justice McKENNA: Proceed.

Mr. LINDLEY: I will reach that in a moment.

VIII.

The payment of the purchase price and issuance of the certificate created a vested right, which the Land Department could not destroy, nor would Congress have the power to divest such a title by supplemental, repealing, or amendatory legislation.

IX.

We have a right to conclude, as corollary to the foregoing principles, that unless the owner of the Pioneer vein has, of his own volition, done or suffered to be done some act which amounts to a revesting in the United States of the rights conferred by his entry, such rights were merged and defined in the patent.

X.

The act of May 10, 1872, was framed on different principles from those embodied in the previous legislation. By that act controlling force must be given to surface boundaries. As a condition precedent to the exercise of what is now known as the

extralateral right, parallelism of end lines of the surface location was required. The act of 1866 granted but the one lode. The act of 1872 granted all lodes whose tops or apices were within the surface boundaries. It distinctly and in unqualified terms reserved all rights which had been acquired under existing laws, and I may say in four distinct places in the act preserves all rights which had been acquired under pre-existing law. It also purported to convey additional rights—that is to say, the other lodes; in other words, to grant something more than the locator or patentee had acquired under the prior laws.

As to the so-called other lodes, or any additional privileges granted by the act of 1872, it may be, for the purposes of the argument, conceded that Congress had the full power to impose the conditions under which such additional rights might be acquired or might vest. If these conditions did not exist, or the law was not complied with, the act and the patent issued under it would not vest title to the "other lodes." Therefore a patent issued subsequent to the passage of the act of 1872 and based upon an entry made prior thereto might be perfectly valid as to the right on the original lode confirmed by the act which had previously vested under the entry, and be considered as inoperative as to the additional or other lodes by reason of the non-parallelism of the end lines. In other words, the patent may be valid as to the linear feet on the Pioneer vein, and inoperative or void as to other lodes, if there might be any.

XI.

There are no "other lodes" in the ground in question. The sole controversy in this case is with reference to the original lode. The agreed statement of facts makes this perfectly plain. The patent conveys the surface ground entered under the act of 1866 and 1,589.94 feet of the Pioneer vein. It recites that it is issued under the provisions of the prior act; that it purports to grant other and additional lodes, which grant may be subject to the criticism of invalidity, but this does not detract from the value of the grant, so far as it pertained to the complete equitable rights theretofore vested and evidenced by the certificate of purchase, as to the original lode and the surface.

XII.

The act of 1872, we think, is susceptible of the construction that it granted, not only all rights theretofore conferred, as to surface ground and the original lode, to the extent named, and in depth indefinitely between rectangular end-line planes, but also granted the vein in depth within the divergent end-line planes.

We have considered that it was the old law which did not provide for parallelism of end lines; the mischief, which gave more in depth than at the surface; and the remedy parallelism of end lines where there were no adverse rights—and the statute so states possibility of conflicts were eliminated—by conferring upon parties who had these irregular locations underground rights within their end-line planes regardless of their direction. But the exigencies of this case do not require that such a question should be de-

termined. All the property here in dispute is within the rectangular end-line planes. The Silva ground claimed by plaintiff in error overlies the dip of the vein and is within the prolonged rectangular end lines of the Pioneer, as defined by the decision of the supreme court of California.

I wish at this juncture to call attention to the fact that the act not only in terms granted these additional privileges to locations held under the act of 1866, but specifically granted them to holders of *patents* issued under that act. Section 9 of the act of 1872 provides that these additional rights shall accrue to the patentees under the prior law where there was no possibility of surrendering or exercising volition and taking something in compensation for surrender, thus indicating by the language of the statute the purpose of Congress to make that stipulation as to the additional rights operative not only to patents with irregularly shaped surfaces, but also to locations irregular in shape. But, as I say, the exigencies of this case do not require that we should insist, or that this court should take the responsibility, if it does not desire to do so, of determining that the act of 1872 gave us the flaring end lines. We are not here claiming absolutely that such is the case. We have suggested it because we think that the statute is susceptible of that interpretation. But the rights of the defendant in error are not necessarily predicated upon that principle. We adhere to the strict right granted us under the act of 1866. The patent simply confirmed these rights, giving us the legal title, we having had theretofore the complete equitable title.

XIII.

The contention of the plaintiff in error, that the owners of the Pioneer vein divested themselves of all extralateral rights by accepting a patent with non-parallel end lines, is, we respectfully submit, predicated on a false premise.

The act itself contains no language which justifies the assertion that the holder of the complete equitable title was called upon to make an election between standing upon his vested title or to surrender part of it and take, in addition, the possibility of something more which the act authorized. The purchaser had no notice, no warning. His attention was not called to the fact that he was called upon to surrender and reconvey to the United States some part of what he had theretofore purchased and paid for in return for something he never asked for, and, in fact, which never existed, to wit, "other lodes." When he received this patent he saw by reading it, it is printed in the record, that it purported to be issued pursuant to the law under which he had entered and paid for the property; that the patent conveyed the property he applied for, to wit, the tract surveyed in connection with his vein, and 1,589.94 feet of the Pioneer vein throughout its entire depth. That is all that concerned him. That is all that he had any knowledge of. Having done all that the law required of him prior to the passage of the act of 1872, in the absence of some adequate provision of law requiring him to elect whether he would remodel his lines, go back and reopen that closed proceeding *in rem*, carve off something which had already been granted to him, and make new lines requiring a new publication, a new proceeding *in rem*, he was entitled to rest upon his title as evidenced by

his certificate and confirmed by the new act. If Congress had ever intended that he should take any other or affirmative steps to protect his antecedent title, it would have said so in express terms and not left it to surmise.

Having done all that the law required of him prior to the passage of the law of 1872, he had a right to rest secure in the faith that when his patent was issued the Government would fulfill its obligation and convey to him what he had discovered, located, developed, entered, and paid for.

If counsel's contention is correct, the patentee voluntarily accepted a patent which, on its face, deprived him of the only thing of value which he had purchased and paid for, to wit, the Pioneer vein, for the sake of obtaining something in the shape of other lodes which never existed, and to which the patent conveyed no title beyond vertical planes drawn through the surface boundaries—in other words, he would be placed in the position of surrendering to the Government everything he had of value, and getting nothing of value in return, because counsel says the patent does not convey anything except what was within the surface boundaries drawn down vertically. It seems to me that the placing of any such construction as that upon the act of Congress is doing violence, great violence, to the true spirit in which these acts have always been construed from time immemorial. Both the State and Federal courts have looked generously and kindly towards the prospector and the miner. They have adopted his primitive methods, have encouraged his primitive ideas, and have always relaxed technical requirements of the law in the interest of the man who goes into the mountains to discover and develop the hidden wealth of the country.

In face of the fact that locations are construed most liberally, that the acts of Congress are construed most liberally, and in face of the asseveration made repeatedly that all rights heretofore existing shall not be affected by this law, counsel says that that rule of interpretation, that strained and impossible construction, shall be placed upon the mere innocent acceptance of the patent delivered to him in the course of the ordinary prosecution of the business of the land office, without warning.

Mr. Justice McKenna: May he not have taken chances like that taken in the case of Walrath *v.* Champion Mining Company, which involved something like $300,000, and where a patent was taken out for what you call an ancillary or subsidiary vein?

Mr. Lindley: But in that case, if your honor please, this question of diverging lines did not enter.

Mr. Justice McKenna: I know it did not enter, but the fact was in that case that there was a different vein from the main vein.

Mr. Lindley: Very true.

Mr. Justice McKenna: And that contention involved rights to the value of $300,000. So it might be—I do not say that it was so—that a party would deliberate as to whether he would take a surface grant or claim extralateral rights.

Mr. Lindley: The value that your honor speaks of in that case was not within surface boundaries. It was the extralateral right.

Mr. Justice McKenna: It was on another vein.

Mr. Lindley: It was on an ancillary vein; but your honor, writing the opinion of the court, said that the extra-

lateral right upon that other vein should be determined by the end lines of the original location. That is the contention we make here, so far as our present extralateral right is concerned, because that is the literal language of the statute.

Your honor also, in speaking for the court, held that the end lines of the location were those marked upon the survey, and in this case we would have these end lines, unless you take the other section, which requires parallel end lines, and make it apply to lodes heretofore located.

The Walrath-Champion case is a precise authority or precedent for our contention for the flaring lines. Otherwise that decision must be qualified by saying that one may have extralateral rights in other lodes within the claim only if the end lines of the previously patented claim are parallel.

Now, the claimant did not even have the chance of getting anything outside of his boundaries. If the interpretation of the law contended for by counsel was correct, he was confronted with an instrument which, on its face, was, to use the vernacular, a "gold brick." It conveyed nothing but a very small part of the vein, his own original vein, and he must have had notice that he was giving up everything for nothing, because he would have no extralateral rights on the other veins, and consequently he could not be taking chances. But he did not have that opportunity to speculate.

Certainly the United States had no thought of trapping its beneficiaries into receiving a worthless instrument. If Congress had ever intended that so valuable and important an attribute to a lode claim as the underground rights, confirmed and granted under prior laws, was to be made the

subject of readjustment to conform to new policies and new restrictions, it is but fair to presume that some notice and warning would have been given to the purchaser, to whom the faith of the Government had been pledged.

There is no such provision made for patentees. They get the benefit of this act because, fortunately, the patent was issued. So, if the patentee under the act of 1866 should be the beneficiary of the law of 1872, why should not an entryman? What is the difference in principle? There was no provision of law compelling the patentee to surrender his patent and take out a new one.

XIV.

So far as any reserved power in Congress is concerned to regulate the mining industry on the public domain, no construction of its legislation is permissible which will sanction its right to deprive a person of vested property rights. Whatever it might do, while the property is located, vested simply in possessory occupation, after the miner had applied for his patent, made his final entry, paid his money, and received his complete equitable title, it was beyond the power of Congress to take it away.

Now, if your honors please, those are the principles upon which we think the case rests before this tribunal. These are the principles which we have endeavored to establish by authorities quoted in the brief.

I now desire to invite your honors' attention for a few moments to the Eureka case. On page 26 of my argument I have printed a reproduction showing what we claim here and what I claim to be in principle the authority for the flaring lines.

There has been a great deal of confusion of thought about this Eureka case. Hardly any mining case of importance comes up before western courts but that one side or the other, or both sides, cite the Eureka case for some purpose. It has elastic properties. It is one of the early classics. The decision was rendered by Mr. Justice Field, sitting as a circuit justice, in a controversy over the ore bodies underneath the Arctic and Atlantic location belonging to the Richmond Company. We have this situation parallel to the one at bar, in the fact that we have the Richmond occupying the relative position of the Kennedy, claiming the ore bodies to the south of the common boundary between the Richmond and the Eureka properties, by their surface location overlying the dip of the vein. There was a great controversy whether it was a lode in that case. It was in the limestone formation, lying in a zone, if you please, between shale and quartzite. The zone was very wide, the lode or the vein material, the ore being found in irregular chambers in the limestone, which had been eroded by the erosive action of water. The contention of the Richmond Company was that it was a pipe vein—that is to say, instead of having the dimensions of length, breadth, and thickness, it ran like a water pipe or sewer pipe put diagonally down into the ground. Their contention also was that, because of the non-parallelism of the end lines, there were no extralateral rights belonging to the Eureka, and therefore, by virtue of the surface ownership of the Arctic and Atlantic, the Potts ore chamber, the particular bone of contention at that time, belonged to the Richmond. This ore chamber was bisected by the common boundary between the two claims, just precisely as is the case

in the Pioneer; substitute Silva for Arctic and Atlantic and you have precisely the situation upon the assumption I have made and as to which no reading of the opinion can prevent the conviction that the court passed upon the element of non-parallelism of the At Last and the Lupita, the tops of the vein being found in all three of the patents. That was the finding of the trial court, and is referred to in the opinion of the Supreme Court of the United States.

Mr. Justice McKenna: That is, it was found in the Eureka and Richmond?

Mr. Lindley: The Champion, At Last, and Margaret or Lupita.

Mr. Justice McKenna: Where is the Champion?

Mr. Lindley: The At Last, the Margaret or Lupita, and the Champion all three belonged to the Eureka Company. All that the Richmond had was this segment of the vein, and it followed down just as the Kennedy had done in this case, by means of its underground location, and had cut across its boundary. It claimed, first, the character of the vein to be a pipe vein, and that they had the right to follow it wherever it ran; and in my humble judgment it was that contention that caused Judge Field to talk about coming in and ousting the neighbors following this gas-pipe vein.

The fact remains, however, that the end lines of at least two of the claims were not parallel, and the fact remains that that was litigated strenuously and fought out in the trial court and in this court. It will not do to fritter that case away by the assertion that all rights could have been obtained under the Champion patent, because this principle was discussed and was determined. It is hardly fair at this time, inasmuch as the mining industry has been developed

on the faith of such construction made by this court, in the face of such language used by this court—it is hardly fair now to say that it was entirely unnecessary.

But we find precedent beyond the Eureka case showing the fact that the end lines were not parallel did not deprive the party of his extralateral right because the ore bodies, as found and confirmed by this court, were between lines drawn at right angles to the general strike of the vein and also between extended diverging end-line planes.

Now, if your honors please, I must pass the Eureka case with this additional suggestion: That there was also a compromise line in that case, crossing the lode, and there was a controversy whether that line would simply define the boundary between the Richmond on the one hand and the At Last, the Margaret or Lupita, and the Champion on the other, or whether the line could be extended so as to cover the dip of the vein. Those were the two propositions. They were both considered by this court. That case has been the precedent for the statements so frequently made and encountered in the decisions of this court—for instance, in the Elgin case and in the Del Monte case—wherever this court has been called upon to determine the difference between the two statutes of 1866 and 1872, that end lines were not required to be parallel under the act of 1866 and did not define the miners' rights in depth of vein. Judge Field said in that case:

"Lines drawn vertically down through the ledge or lode at right angles with a line representing this general course at the ends of the claimant's location will carve out, so to speak, a section of the ledge or lode within which he is permitted to work and out of which he cannot pass."

Judge Field was like Æneas at the siege of Troy, so far as mining law was concerned, the greater part of which he was and all of which he saw. He was part and parcel of the mining institutions of California. So I think he was the author of the California statute which provided that the rights in mining claims should be adjudicated by the courts according to the rules or customs of the locality. His expressions at that point of time, not found in the Eureka case—a time far removed from the passage of the act of 1872—are the principles which have governed up to the present time. The situation was thoroughly fresh in his mind at that time, and I do not think that his language should be held to be meaningless, that what he said there he did not mean, and that we have no right to rely upon it.

Counsel cites the Flagstaff case under the act of 1866, where, if a man made his location so that he only got 100 feet of vein within the lines, that was all he received. That same rule was followed in construing the act of 1872. The two acts are precisely similar in that regard.

That is illustrated upon the diagram of the Dunderberg lode. That lode was applied for, according to the language of the opinion, after the passage of the act of 1872. The Frostberg lode occupied precisely the same position as the Argonaut in the case at bar. In that case the circuit court of appeals said that the owner of the Frostberg lode had done everything he was called upon to do before the act of 1872 was passed; had filed his diagram, entered the land and paid for it and got a certificate of purchase, and he was awarded the other lode. That is, the Dunderberg lode extended across through the Frostberg. (See large diagram.)

That same rule was followed in the Argentine-Terrible case under the act of 1872, decided by this court.

If your honors please, I would like to read into the record some additional authorities upon the effect of the certificate of purchase and the supervisory power of the Land Department over it. I cite to your honors Simmons *v.* Wagner, 101 U. S., 260; Cornelius *v.* Kissel, 128 U. S., 456, 460, wherein the court uses this language:

"When the tract which was subject to entry was thus purchased and paid for, it ceased to be subject to the disposal of the United States. It was not in equity their property."

In the case of Rice *v.* R. R. Co., 66 U. S., 358, 374, it was said:

"If the legal effect of the act of Congress was to grant a beneficial interest in land, it is clear that it was not competent for Congress to pass a repealing act and divest title."

Suppose we stood here and were told that Congress had absolutely repealed the act without providing any substitute, where would we be? Could Congress take away the right acquired by location and entry of a mining claim? The grant of a mining claim, this court has held in a number of cases, operates as a grant of right of exclusive possession. It is an invitation to the miner to develop the country, to expend his money, with the right to rely upon the good faith of the Government, and the Government is bound by the same rule in the disposition of its public lands, I take it, as ordinary men are bound in their business transactions upon the moral side of life.

Counsel lays some stress upon the fact that the Land De-

partment had this supervisory power which has been referred to. I would like to refer to the case of Cornelius *v.* Kissel once more, wherein we find a quotation with reference to this supervisory power of the Land Department, the right to recall a certificate of purchase and nullify it. This court says, in substance, that after the man has secured his certificate of purchase by entry and payment he cannot be deprived of it; that the right to a patent therefor can no more be taken away from him by order of the Commissioner than can any lawfully acquired property, and that any attempt at deprivation in that way may be corrected by the judiciary.

In the case of Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589), cited by my distinguished adversaries, they stopped their quotation a little too soon, because this court says, following the quotation in my adversaries' brief:

"But this right can only be exercised upon notice to the entryman."

The act of 1872 made no provision for notice.

Will your honors grant me a moment to distinguish the case of Lakin *v.* Dolly from this case? That was a case where 257 acres were granted, and which brought about the dialogue here with reference to the operative effect of the denial of petition for a writ of certiorari. That case has since been explained and differentiated by the circuit court of appeals, and by the same judge who wrote the original opinion. There is a diagram of the situation at page 54 of my brief. I think the opinion in the circuit court of appeals was written by Mr. Justice McKenna. The Lakin-Dolly case was explained in this way: Here was a piece of ground containing

257 acres, with a lode in one end which covered the town of Johnsville—a settlement of people, stores, houses, and warehouses—and they had taken in a large area of land there, and had a patent for it. The title originated under the act of 1866. It appeared in that case, according to the circuit court of appeals in the Peabody case, recently decided and reported in 111 Federal Reporter (cited in our main brief), that ordinarily the presumption would follow, from the possession of a patent, that it was regularly issued, and that the quantity of land was authorized by the local rules; but, said the court of appeals—

"The admitted facts effectually rebutted the presumption which would otherwise have attended the patent—the presumption that the locator was lawfully entitled to all the premises described in his grant and that all the previous requisites of the law had been complied with."

In that case there was an agreed statement of facts which specifically stated that there was no local rule or custom that allowed to the miner an excess of 100 feet on each side of the center of the vein, and that the Land Department, in charge of determining the extent of the surface, had issued a patent in violation of that agreed fact.

In the North Star case, I have on page 56 of my main brief a diagram which shows how these diverging and converging lines may happen by a change in the course of the vein in different locations. This North Star was one of the early locations in Grass Valley. It was made up of an aggregation of claims—the Helvetia and Lafayette, Independence and White Rock, and a number of claims—which were ultimately united into one ownership. Of course, before

they were consolidated each individual could not have claimed his lode at right angles to the local course within his particular claim without producing inequalities in depth, as the course of the vein was irregular.

The manner in which these things occur under the act of 1866, I think, is clearly pointed out in the North Star case. The end lines were not parallel, but at the extremities each line was at right angles to the strike at that point, and that made perhaps a converging line, whereas it might have been a diverging line. There had been no entry in the North Star case at the time the act of 1872 was passed. They had simply applied for a patent, and it was held up for a long while, so that they did not receive it for a number of years after 1872. This case was decided in the circuit court of appeals and certiorari applied for to this court and denied. I do not understand that the court is responsible for the legal value of the opinion of the circuit court of appeals in that case, but that case has been cited by this court in connection with some of its later decisions. The case stands as a classic in its way.

If your honors please, I am admonished that my time has almost expired, and I do not know that I can add anything more to the literature of this case or enlighten this court upon the subject before us.

I might say that this case has a moral environment. If such be the case, this court recognizes it, and it is not necessary for me to dwell upon that branch of the case. Technically it is not the proper thing to do. I simply submit that these ore bodies are within the rectangular planes which the courts have sanctioned as complying with the act of 1866; that we had the equivalent of a patent under the act of 1866,

and the act of 1872 in three distinct parts, specifically, carefully, cautiously, and repeatedly reserved all rights theretofore granted.

"That sections 1, 2, 3, 4 and 6 of an act granting the right of way to ditch and canal owners over the public lands and for other purposes, approved July 26th, 1866, are hereby repealed, *but such repeal shall not affect existing rights.* Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act"——

Ours is one of those cases.

—"and all patents for mining claims heretofore issued under the act of July 26, 1866, shall convey all the rights and privileges conferred by this act, where no adverse rights exist at the time of the passage of this act" (sec. 2328, R. S.).

"Nothing in this act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July 26th, 1866, *nor shall this act affect any right acquired under said act*" (*ib.*, sec. 12).

And section 16 provides:

"That all acts and parts of acts inconsistent herewith are hereby repealed; provided *that nothing contained in this act shall be construed to impair in any way rights or interests in mining property acquired under existing laws.*"

These clauses manifest the unequivocal intention of Congress to preserve all rights previously acquired, and the act

must be so construed, as was said by Judge Field in the Eureka case (4 Sawyer, 323):

"The act of 1872 preserves to the miner the rights acquired under the act of 1866 and confers upon him additional rights."

It may not be out of place for me to say in closing that this case came up before the supreme court of California in banc, which court was graced by such men as Chief Justice Beatty, formerly also chief justice of Nevada and for a long time a *nisi prius* judge; Judge McFarland, who was part and parcel of the early mining history of California, and other distinguished jurists. They concurred in the opinion, which was unanimous, in favor of the extralateral rights within the rectangular planes.

I am grateful to the court for its patience.

Supreme Court of the United States.

Nos. 49 and 58.—October Term, 1902.

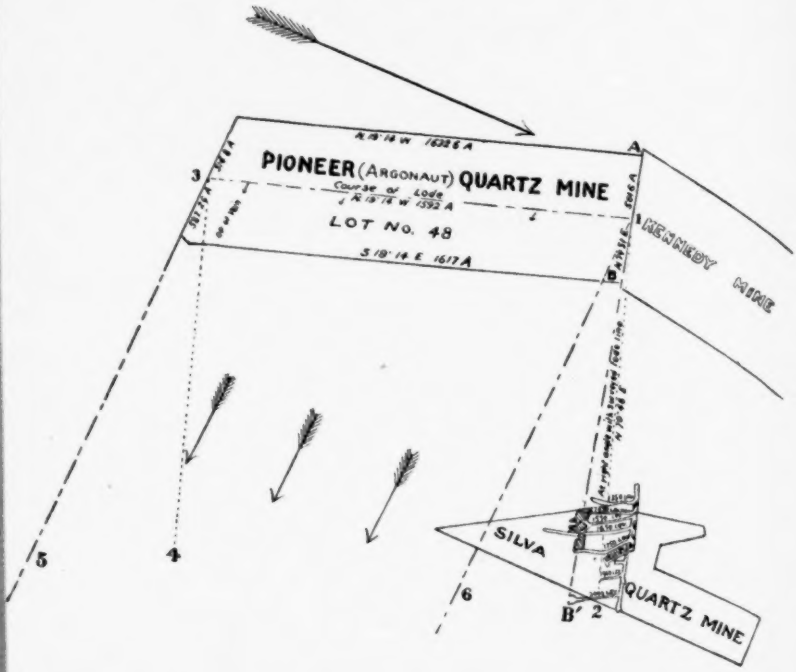
The Kennedy Mining and Milling Company, Plaintiff in Error, vs. The Argonaut Mining Company. (49)	In error to the Supreme Court of the State of California.
The Kennedy Mining and Milling Company, Plaintiff in Error, vs. The Argonaut Mining Company. (58)	

[March 9, 1903.]

This was an action for damages for the value of ore alleged to have been taken by the Kennedy Mining and Milling Company from ground belonging to the Argonaut Mining Company, situated in Amador County, California. The Kennedy Mining and Milling Company denied taking any ore or gold-bearing rock which was the property of the Argonaut Mining Company, and averred that it was the owner of the vein or lode from which the rock was taken. The case was submitted to the trial court on an agreed statement of facts, and resulted in a judgment in plaintiff's favor, which judgment was affirmed by the Supreme Court of California. 131 Cal. 15. Writ of error was then allowed, and each party docketed the case in this court, but the record was only printed in No. 49.

The parties are co-terminous mining proprietors upon the same vein or lode, the top or apex of which passes through the Pioneer location, belonging to the Argonaut Company, into the Kennedy location, belonging to the Kennedy Mining and Milling Company.

A certain map of the Pioneer and Kennedy mining claims was made part of the findings of fact, but the Supreme Court of California made use of a diagram simplified from that exhibit, which is as follows:



The common boundary is the line A–B, crossing the lode at the point marked 1 on this diagram. The line A–B–B′ is this end line produced indefinitely in the direction of the dip or downward course of the vein.

The Kennedy mine was entered, and payment made in November, 1871, and the patent was issued July 29, 1872.

The Pioneer was located under the law of 1866; on February 23, 1872, it was entered and paid for; and the patent was dated August 12, 1872.

During the pendency of the patent proceedings a conflict arose as to a segment of ground lying at the north end of the Pioneer, and at the south end of the Kennedy. This controversy was subsequently adjusted by an agreement between the then owners of the two properties. Both parties had sunk working shafts, the openings of which did not start at the apex, but each intersected the vein, and all the workings of both were on this vein. The vein on its downward course passed underneath the Silva mining claim belonging to the Kennedy Mining and Milling Company, located and patented on another vein, which had its apex within the Silva ground. This Silva ground was patented to the Kennedy Mining and

Milling Company, February 6, 1893, and the patent recited an entry made in October, 1892.

The patent contained this reservation: "That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge."

The ore in dispute, although taken from the Pioneer-Kennedy vein, was south of the Kennedy south end boundary, as shown by its patent, and the Kennedy Mining and Milling Company did not assert any right to it by virtue of its ownership of the Kennedy mine. The ore though taken from beneath the surface of the Silva location was taken from the discovery lode of the Pioneer location, which was the only lode that had its apex within that location. It entered the location near the middle point of the southern end line, and ran northerly through the location in a direction practically parallel to the side lines, through the center of the northern end line.

Plaintiff in error admitted the ownership by the Argonaut Mining Company of the Pioneer mine, and that the lode had its apex within its surface location, but denied that the quartz taken by it from that lode was within that location, on the ground that because of non-parallelism of the end lines of the Pioneer, it carried no extra-lateral rights; and that if the court could as matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel would be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The Supreme Court of California held that the Argonaut Company was entitled to all the rights which would attach under the act of 1866, and to any additional rights which inured under the act of 1872; that the act of 1866 did not require parallel end lines, and the failure to so parallel them in the Pioneer location did not deprive that claim of extra-lateral rights; that the extra-lateral rights on lodes located under the act of 1866, where end lines were not parallel, were to be defined by drawing lines at right angles to the general course of the lode, at the extreme points of the lode within the location; that the contention of plaintiff in error, that because the description in the Pioneer patent commenced at the south end of the claim, and the south end line was first run, the inequalities arising through diverging end lines should be adjusted by drawing a produced line from 1 to 6 in the diagram, parallel to the produced south end line from 3 to 5 in the diagram, could not be sustained.

The ore bodies in controversy were south of the northern end line plane of the Pioneer as made by agreement the boundary line between it and the Kennedy mining claim, and also within the extra-lateral right planes con-

structed at right angles to the general course of the lode through the extreme points of the lode within the location.

The act of July 26, 1866, (14 Stat 251, c. 262,) provided that patentees thereunder should have "the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

The act of May 10, 1872, (17 Stat. 91, c. 152, §§ 2, 3,) provided that the end lines of each claim should be parallel to each other, and that locators should have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations: *Provided*, That their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges."

Mr. Chief Justice FULLER delivered the opinion of the Court:

Plaintiff in error contended in the courts below that, by force of sections 2 and 3 of the act of Congress of May 10, 1872, title to the ore in question passed to it through its patent to the Silva mine, and did not pass to the Pioneer through its patent because the end lines of the latter were not parallel to each other.

The defendant in error contended that its title was not acquired under the act of 1872, but under the act of July 26, 1866, which did not require parallelism of end lines.

In these circumstances it is held by a majority of the court that a Federal question was so presented that we have jurisdiction.

It was stated in the agreed statement of facts that the Kennedy Mining Company on October 13, 1870, filed its application for patent in the United States land office at Sacramento, California, and that a diagram of the premises for which patent was applied for was posted in that land office October 15, 1870; that on January 13, 1871, the Pioneer Gold and Silver Mining Company, the immediate predecessor in title of the Argonaut Company, filed its application for patent in the same land office, and a diagram of the ground it claimed, and for which patent was sought, was posted in the office of the register of the land office, and upon the claim; that there was a surface conflict as to area claimed by the respective applicants for patent, as shown by the proceedings in the land office, the conflict occurring on the northern end of the Pioneer mine as applied for, and the southern end

of the Kennedy mine as applied for; that on said January 13 the register and receiver of the land office made and entered an order in respect of the adverse claim of the Pioneer, directing proceedings in the case of the Kennedy Mining Company to be suspended so far as affecting the piece or parcel of land described in the order; that on February 20, 1871, the Pioneer Gold and Silver Mining Company and the Kennedy Mining Company entered into a compromise agreement, in which each of the parties withdrew from their applications their claim to a certain portion of the surface ground in dispute; and which provided that "the dividing line between the claims of the respective companies shall be one drawn at right angles with the general course of the lode or lead, and surface ground thereto appurtenant, and at the point hereinbefore designated." The line thus agreed upon was the line from A to B in the foregoing diagram. Thereafter surveys for the patent for the Kennedy mine and for the Pioneer mine were duly made, and patent was issued to the Kennedy Mining Company, July 29, 1872, and to the Pioneer Gold and Silver Mining Company, August 12, 1872. The Argonaut Company became the owner of the Pioneer mine, July 3, 1893, by a deed from the Pioneer Gold and Silver Mining Company, and the Kennedy Mining and Milling Company became the owner of the Kennedy mine by conveyance from the Kennedy Mining Company, dated December 25, 1886; that the Kennedy Mining and Milling Company became the owner of the Silva quartz mine, February 6, 1893, by a patent issued to it on that day, which recited that that company on February 13, 1892, duly entered and paid for the mining claim or premises known as the Silva quartz lode mining claim.

It thus appears that a common end line was established by the patent surveys, which described this line as crossing the lode, and that the Kennedy Mining and Milling Company purchased with the knowledge that this was a common boundary established as such by the patents many years prior to its purchase. The common boundary A B, crossing the lode, was fixed as the result of an adverse proceeding in the land office, and the agreement entered into with respect thereof was as set forth in the agreed statement of facts.

We think, then, that the Kennedy Mining and Milling Company is estopped from asserting any right to the ore body in dispute, which it was also agreed was extracted by the Kennedy Mining and Milling Company from the vein south of the vertical plane drawn through the line A B produced in the direction B′, and which was the same vein which had its top or apex in the Kennedy quartz mine, and in the Pioneer quartz mine, and was continuous from the apex of both properties downward to the lowest depths. The boundary line agreed on fixed the rights of the parties in length on the lode, and so involved the extra-lateral right as between them.

The Argonaut Mining Company and the Kennedy Mining and Milling Company succeeded to the interests of the Pioneer Company and the original Kennedy Company, with a knowledge of the boundary line so determined, and both parties were concluded by it and the results following therefrom. *Richmond Mining Company* v. *Eureka Mining Company*, 103 U. S. 839, 846.

Apart from the questions discussed by the Supreme Court of California, we are of opinion that the judgment must be affirmed on the foregoing ground.

Judgment affirmed.

Mr. Justice WHITE and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.